

# **Just-Is: Contingency, Desire and Temporality.**

## **An Inquiry on the Relation between Law and Justice**

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## **Declaration**

I, Javier Taillefer, hereby declare that this thesis is my own work

# ABSTRACT

This thesis investigates the formation of subjective understandings of justice in relation to law. Liberal theories of justice and legal theory have frequently addressed this question on a macro scale, respectively approaching justice as a given balance between freedom and equality or focusing their attention on the kind of political and legal reforms that would be necessary in order to provide citizens with higher levels of justice. However, the role of the particular subject who demands justice has not received as much attention as the law-maker or the judge in these studies. Using a psychosocial approach that puts emphasis on the relation between the political and psychic life of the subject, this research aims to fill such lacuna by looking at the way in which particular subjects come to develop diverging understandings of justice as a result of their interactions with the law.

This dissertation is organised in five chapters. The first chapter reviews the work done by four different schools of legal thought, locating the particular subject who seeks justice as a common blind-spot to all of them and also as the departing point for this research. Building on this, the second chapter considers normativity and generality as the two basic features that define the relation between law and the subject; pointing to subjectivity, contingency, and justice as the three constituent limits of the law that become visible in the light of the abovementioned features; and positing contingency, desire, and temporality as the three basic dimensions in the study of the emergence of subjective understandings of justice. Focusing on the first of these dimensions, the third chapter focuses the role played by contingency in the law and in the subject's own narrative of justice, considering Walter Benjamin's notions of "fate" and "character" as opposite ways of articulating it. The fourth chapter investigates the role of "desire" and "jouissance" in the production of such narratives and how, in turn, they appear as two possible and diverging ways of understanding justice in view of the shortcomings of the law. Finally, the fifth chapter centres its attention on the temporality of law and justice, considering Heidegger's notions of "expectation" and "anticipation" as opposite ways of conceiving the temporality of the latter.

In summary, this research offers a new approach to the study of justice by focusing on the way in which this term comes to be used and understood by particular subjects in their interactions with the law. It addresses the relation between three dimensions in the process of formation of subjective understandings of justice, also suggesting that these processes appear as a response to a structural failure of the law to provide justice.



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## INTRODUCTION

### A Sense of Perplexity

If there is something that was engraved on my memory during my first year as an undergraduate student it would have to be watching the news with my roommates after class. Later on, that little tradition we used to have would affect my life and research interests in ways that I could not even begin to fathom at that time. It was the academic year 2006-2007, and the protests organised by different groups of victims of terrorist attacks were receiving extensive media coverage.

In February 2006, the Spanish Supreme Court had passed what would come to be known as the “Parot Doctrine.” This case-law<sup>1</sup> entailed that certain convicted criminals (particularly those accused of having committed terrorist attacks) who were tried and sentenced according to the Criminal Code Act of 1973 would see their effective sentences extended from 20 to 30 years. This is due to a new interpretation of the law, according to which it would be read henceforth in the light of the new and more punitive Criminal Code Act of 2003. Taking its name from Henri Parot, former member of the Basque separatist group ETA, and incarcerated at that time, it is commonly accepted that the Supreme Court decided to adopt this resolution in response to the ongoing protests led since 2004 by the Association of Victims of Terrorism (AVT) and the conservative People’s Party (PP) against the imminent release of a significant amount of former members of ETA who had been arrested and prosecuted during the late 1980s and early 1990s.

By the time I moved to Granada to study political science and law, all this had already happened. The inmates affected by the Parot Doctrine had appealed to the Constitutional Court, and more protests had followed. The AVT sought to sway the Constitutional Court in the same manner that they had managed to affect the decision made by the Supreme Court, and thus they started rallying people and

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<sup>1</sup> The Parot Doctrine appears explained in further detail in Chapter Two and Chapter Three.

organising demonstrations. This is what I remember the most, and what has haunted my research ever since. In some of these rallies thousands of people would take to the streets and show their discontent with the political and judicial institutions from which they expected a favourable resolution. In others, a few hundred would demonstrate in front of the prisons where former members of ETA were still serving their sentences. And yet, notwithstanding the particularities of each and every protest, all of them presented a common element: a demand for justice.

Having recently learned the basics of the law and its mechanics I could not help but to feel puzzled by these events. In our first day of class we had been taught that law and justice are not the same. The latter, while being a desirable side-effect of the law, is not a priority nor a necessary consequence of it. We had learned about the importance of the rule of law and the danger entailed by exceptions and precedents with the potential to disrupt it. We had also studied the non-retroactivity of freedom-restraining legal norms. Even entertaining the possibility that justice and legal punishment could be treated as equivalents, the people taking part in these protests had already been provided with all the justice that the rule of law could provide. Moreover, they had been provided with “justice” beyond the rule of law.<sup>2</sup> Hence my feeling of perplexity before such events, and the emergence of a series of questions that would eventually become the seed for this research project: What do they really want, what do they really mean, when they say that they want “justice”? Are they simply after the enactment of harder legal punishments? If so, and accepting the possibility that they could take justice and law enforcement as equivalents, how severe should these punishments be in order to satisfy their urge for justice? If their desire for justice remained unsatisfied regardless of the severity of the punishments approved and inflicted upon these subjects, could it be something other than justice that they really want? Revenge perhaps? And, if so, why do they seek to cloak their wish for vengeance with the appearance of a demand for justice?

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<sup>2</sup> The resolution adopted by the European Court of Human Rights in 2012 –confirmed in October 2013– stated that the prolonged imprisonment of those inmates affected by the approval of the Parot Doctrine by Supreme Court violated articles 5 and 7 of the European Convention of Human Rights, and article 9 of the Spanish Constitution.

### **Et tibi, Politicorum?**

Following this line of reasoning, I started looking for answers. Given the fact that my bewilderment had its origins in the disparity between my (very basic) knowledge of the functioning of the law and the events that I had witnessed, I turned to politics in the hope to find a complement with the potential to fill this lacuna. Visiting the library in the search for a theory of justice that could provide me with an explanation for the protests that I had seen on TV, I eventually came across and became familiar with the work of political theorists such as John Rawls, Michael Sandel, Robert Nozick and Michael Walzer. The discovery of their work left me with mixed feelings regarding the character of their theories of justice and the true nature of my inquiry. Notwithstanding their differences, they all seemed to consider justice as a form of balance between freedom and equality. An approach that, on the one hand, did not apply to the kind of phenomenon I was interested in; and, on the other, seemed to displace the core of the problem onto the spheres of freedom and equality instead of addressing justice as such. I started to realise that I was not as interested in having a definition of justice as in the process through which a subject may come to develop a particular understanding of it. An understanding of justice that could significantly differ from “legal justice.”

After these first encounters with political theory, I turned again to the law in search of answers. The protests that I had seen during my first years as an undergraduate student could not be explained through the study of positive law insofar as my sense of perplexity arose, in the first place, from the contradiction between them and all the principles that were part of my academic formation. The political theorists whose work I had read seemed more intrigued by the tension between freedom and equality in Western societies than in the kind of phenomenon I was interested in. Surely I could find an answer, at least, in legal theory? – I could not be the first one to wonder about the origins and nature of the understanding of justice of a subject who goes before the law demanding it. In other words, I could not be the first one to think “We may have such and such ideas about justice, but what is it that a justice-seeking subject really means by justice, what is it that this subject truly wants when he asks for justice?” Natural Law, Legal Positivism, Legal Realism, Critical Legal Theory, all of these schools presented the relation between law and justice in a different fashion –as the concordance between law and a higher

moral order, as a form of judgement external to the validity and efficacy of law itself, or as an ideological construction. Given their differences and considering their own understandings of the law and its functioning, all of these schools offered different solutions and institutional reforms meant to improve the law and secure higher levels of justice. Nevertheless, they did not appear to give great importance to the possibility that the understanding of justice of the subjects whose lives they were meant to improve could differ from their own understanding of justice, or to the way in which the law itself could affect such views on justice.

### **Aut viam inveniam...aut faciam**

Realising that I would not be able to find a straightforward answer to the questions that had been haunting me, I decided to circumnavigate the problem. I became interested in political philosophy, sociology, ideology, discourse analysis, psychoanalysis, and pretty much any other discipline that could carry within itself, even if only indirectly, the promise of filling the lacunae that legal theory and liberal theories of justice seemed unable to explain.

The fortuitous, when not outright accidental, discovery of the existence of a transdisciplinary approach to the analysis of psychic, social, and political phenomena called “psychosocial studies” meant a significant change in my way of addressing this problem. None of the disciplines that I had approached before could offer a comprehensive view of the kind of phenomenon I was interested in but, given the possibility of combining and complementing several of them, I could come up with a theoretical apparatus of my own specifically designed to address this issue. In other words, I had the chance to ostensibly be the first to lay the ground for the study of the meaning-making processes behind the use of emotionally-charged and politically-significant concepts such as justice: processes in which the urge to confer meaning on this type of concept in/through our social interactions may respond to the need to construe and make sense of our own subjectivity.

Considering the fact that the two areas of study taking justice as one of their central problems (namely, liberal theories of justice and legal theory) had seemingly neglected the role of the subject demanding it –along with the processes through which this subject may come to conceive it, and the expectations generated by such processes– I had come across a blind-spot that presented me with the opportunity

to make my own contribution to the study of justice. On the one hand, taking this lacuna as the departing point for my research project could finally help me get closer to the kind of answers I sought; and, on the other, it also appeared as the chance to complement the work done by scholars working in the fields of political and legal theory with a psychosocial approach. An approach that, notwithstanding the broader political and legal implications of justice as an object of study, could also give some insight into its role in the production of subjectivities, and the way in which the unconscious may condition our own understanding of justice. In this regard, one could arguably say that the research conducted in this project represents a theoretical –although non-normative– contribution to the study of the relation between justice, law, and subjectivity. Instead of trying to offer a definition of justice or proposing political and legal reforms that could improve it, the goal of this research is simply to comprehend the way in which the subjects constituting the citizenry of a given state may come to understand justice through their interactions with the law qua embodiment of the political status quo. Something that, hopefully, could eventually inform and complement the study of justice developed in other disciplines.

### **Trying not to fall between two (or more) stools**

In this respect, there are two points that require further clarification at this stage: one regarding the relation between previous studies of justice and my own research, and the other about the role of the law in it. On the one hand, my research does not seek to debunk but to complement the work done by scholars such as Rawls or Nozick. Here, their work is to be considered as highly elaborated forms of the very subjective understandings of justice that constitute the cornerstone of this project. On the other, and this is not to be underestimated, it is important to notice that although this thesis is chiefly focused on the relation between law and justice, the former plays a rather metonymic function in this analysis: it appears as the formal and primal embodiment of the economic, social, and political status quo. This means that, for the sake of this research, whatever subjective notions of justice could emerge from a direct interaction with the law should be read as well as the possible outcome of a more or less direct confrontation with the status quo at such levels.

Nevertheless, and notwithstanding the relevance of these issues, one could arguably imagine that being faced with the opportunity (and the challenge) to lay the ground for the study of justice not as a substantive concept or as an aspiration of the legal and political system, but as a category of understanding (as the way in which a subject may come to use and understand this term) has entailed as well a significant change in the questions driving this research. Thus, as interesting as they may have been in their own right, the questions originally arising from my experiences as an undergraduate student eventually evolved into more basic but also more pertinent ones: When do we start talking about justice? What kind of circumstances could move us to do so? What kind of unconscious processes could lead to the production of such subjective understandings of justice? What is the role of the law in their emergence? How do we come to perceive the possibility of attaining justice through these meaning-making processes? What do we need in order to feel that justice has been served? How does it affect our relationship with the law?

The purpose of this project is, in the end, to investigate the formation of subjective understandings of justice through –and as a result of– our encounters with the political, social, and economic relations of power crystallised in the law. Considering that there may be as many subjective understandings of justice as there are subjects who have ever demanded it, this project cannot and does not pretend to offer an all-encompassing solution to the problem of justice and how each and every subject conceives it. Its goal, on the contrary, is to provide a theoretical framework that could help future researchers to navigate the conundrums and implications of this problem without having to study from scratch its most basic dimensions of analysis. With that purpose in mind, this research aims to build a theoretical framework capable of providing a basis from which to comprehend the formation of particular understandings of justice and their problematic relation with the law. A theoretical framework which will be complemented, illustrated, and informed throughout the second half of this thesis with the introduction of two cases of victims of terrorist attacks: Angeles Pedraza and Irene Villa. Two cases that, acting as a recurring guiding theme, are aimed to anchor the most abstract aspects of this theoretical construction to the real-life experiences of two subjects who, in spite of

having gone through arguably similar dramatic experiences, have developed two radically opposed understandings of justice .

It is important to bear in mind the illustrative character of these cases. Notwithstanding their importance in the development of the argument presented over the following pages nor the fact that they have also helped me ground the most theoretical aspects of this research to the real-life experiences of two actual justice-seeking subjects, their role is largely exemplifying. This means that, regardless of their ostensible and actual relevance, they are not to be considered as case studies but as a common guiding theme aimed to link together several aspects of this study whose connection could otherwise be overlooked. Undoubtedly one may argue that, given their importance, it may be worth it to treat them as proper case studies and develop a more empirical approach in which their particularities could be analysed more thoroughly. Having considered that possibility myself, I finally opted to discard it for two reasons. The first one follows logistical motives, and the second one obeys the need to prioritise one aspect of my research over another. In the first place, I decided to focus on the analysis of the interviews, speeches, and public appearances of Pedraza and Villa instead of conducting direct interviews or transcribing their life histories because the degree of privacy required by such practices could arguably jeopardise the illustrative character that I sought in these two well-known and publicly-reported cases. Secondly, when I started considering the possibility of including the experiences of these two subjects in my research I had to decide whether I preferred to focus almost exclusively on the specificities of these cases or to emphasise their public and exemplary character in order to lay the ground for a theoretical apparatus that could open the door to a new approach in the study of justice. After much consideration, I finally opted for a more theoretical approach in which the experiences of Pedraza and Villa would not be treated as proper case studies but as a recurring guiding theme in my analysis of the formation of subjective understandings of justice.



## Crystallising justice

At this point one may also wonder about the true role of the law and political violence –“terrorist attacks”– in this project: Why focus on the relation between justice and the law when it would also be possible to discuss its relation with politics (democracy, representation) or the economy (inequality, distributive justice)? Why that interest in criminal law rather than in other fields such as constitutional, property, or international law? Why focus on uncommon but fairly visible cases of political violence when it may also be interesting to investigate the relation between justice and the disproportionate legal punishment for minor offences leading to the massive incarceration of marginalised minorities?

Insofar as the law appears as the formalisation of social, political, and economic structures of domination, it also plays a metonymic role in the study of the relation between justice and these spheres. The discrimination of collective subjectivities on the basis of their gender, ethnicity, or religion may give rise to the appearance of demands for justice. A lack of political representation may lead as well to the emergence of such demands. Increasing levels of economic inequality may also trigger their appearance, as we have seen since the beginning of the Great Recession in 2007. However, it is in the law where the status quo generated by such structures of power and domination becomes officialised. It is in the law where certain relations of power that may have only existed *de facto* up until that point become normalised as a *de jure* state of affairs that should be accepted and respected by all those involved. Hence the metonymic character of the law in this study of the formation of subjective understandings of justice. We may come to develop new ways of conceiving justice through our interactions with the structures of domination found in other spheres, but it is in the law where such structures become more clearly visible and equally subject to questioning.

The decision to restrain this research to the analysis of the relation between criminal law and the emergence of new subjective understandings of justice responds to arguably similar reasons. Even if criminal law could be considered, as one professor told me once, as “the law applied to vagrants, whores, and thieves” and civil law as “the law applied to regular people,” it is not as if other disciplines such as tax or property law did not help perpetuate such forms of domination and

marginalisation. The reason behind the focus on this particular branch of law is that the cases it is applied to –murder, abduction, terrorism, etc. – seem to generate a considerably more emotional and forceful response than others such as breach of contract or tax evasion, giving further visibility to the emergence of subjective understandings of justice that in other less “appealing” cases would otherwise go unnoticed.

Finally, the emphasis on cases of political violence –such as the terrorist attacks at the root of the demonstrations that gave rise to my initial interest in this topic– appears as a consequence of the decision to focus this research on the relation between law and the emergence of new ways of conceiving justice. As will be explained in further detail over the following pages, these subjective understandings of justice do not only appear in response to certain events that may require the intervention or mediation of legal and judicial institutions, but also as a result of their shortcomings in this regard. As a result of the feeling that these institutions have not or cannot deliver the kind of justice that they had promised in the first place. Having Walter Benjamin’s *A Critique of Violence* ([1921] 1996) and Jacques Derrida’s *Force of Law* (1990) as two major sources of inspiration, the possibility of focusing this research project on cases of political violence rather than on other circumstances in which the law may have been breached offered a unique opportunity. According to the work of these authors on the subject, the legal punishment for breaching the law responds not only to the damage that such behaviours could cause to those directly affected by it, but also, if not primarily, to the challenge that such actions pose to the very authority of the law. In the case of political violence this aspect becomes even more prominent: the primary goal of breaching the law in such a way is not to obtain profit or achieve some form of enjoyment, but to question the might and authority of law itself. Hence the response of legal and judicial institutions to these cases tends to be swifter and harder than in others insofar as they call into question their very existence, giving further visibility to the gap between the true end and functioning of these institutions and the interests of the subjects whom they are supposed to defend.

In this manner, having this thesis revolve around the relation between justice and the law, criminal law, and cases of political violence responds to three issues: the metonymic potential of the law in the study of the relation between justice and

other spheres such as politics or the economy; the clearer response and demands for justice that cases of criminal law tend to generate in comparison with others; and the higher visibility of the gap between the interests of the law and those of the subjects it is supposed to protect when its authority becomes openly challenged.

Keeping these clarifications in mind, the argument presented here is that subjective understandings of justice arise, in the first place, when the life of a subject is severely disturbed by the irruption of a series of arguably unforeseeable circumstances (political violence) that may lead this subject to seek help from the law in order to see his particularity of experience recognised and his life restored to normality. Secondly, the law delivers the sheer enforcement of the norms that constitute it instead of providing the subject with the kind of recognition and restoration that he initially hoped for. That is to say that a particular way of conceiving justice may be prompted by the occurrence of certain unexpected circumstances but only becomes consistent and clearly visible through an encounter with the limits of the law and its structural impossibility to provide justice: through an encounter with the abyss between the actual functioning and enforcement of the law, and its unfulfilled ideological promise of justice.

At an epistemological level, this psychosocial incursion on a subject traditionally reserved to the fields of political and legal theory aims to fill some of the lacunae that they seem to present in the study of this topic. On the one hand, it seeks to offer a non-normative account of justice beyond the idea of “justice as fairness” and its tendency to treat it as a given balance between freedom and equality; and, on the other, it also aims to complement legal theory by positing a series of questions that should be considered before making suggestions regarding the improvement of our legal and judicial systems. Rather than invalidating the findings made by scholars working in the abovementioned disciplines, this research seeks to complement them: raising a series of questions with the potential to open a transdisciplinary dialogue with them while also bringing the field of psychosocial studies closer to these disciplines.

While this argument and the theoretical framework presented here have been designed to offer a new approach to the study of justice, this does not entail that it may not be adapted to the analysis of other emotionally-charged and politically-

relevant concepts –e.g. democracy, freedom, tolerance, peace– which may be subject to similar meaning-making processes. Moreover, this theoretical work may also constitute a departing point for more empirically-oriented studies aimed to scrutinise the development of new political scenarios such as the peace process in Colombia. However, the novelty of this study of the formation of subjective understandings of justice does not lie in its epistemological relation with political or legal theory, nor in its potential applications to the study of other political phenomena. What makes it unique is its goal to place the subject at the forefront of an eminently political problem, emphasising the role played by politics in the psychic and social life of the subject, and thus going beyond the feminist motto “the personal is political” in order to defend that the political is equally personal.

### **Thesis structure**

Considering the interest of this research in justice as a term whose content appears largely dependent on the meaning-making processes resulting from the irruption of disturbing and unforeseeable circumstances in the life of a particular subject, and the latter’s subsequent interactions with the law and its limits, the structure of this introduction has intentionally sought to mirror the way in which a sense of perplexity before certain unexpected –sometimes trivial, sometimes life-changing– events can lead up to the production of a way of thinking about the subject that tends to break with the normality that was called into question by such events.

Following this introduction, Chapter One provides insight into the decision to take legal theory, instead of liberal theories of justice, as a departing point for this thesis while also detailing the basics of four major schools of legal thought (Natural Law, Legal Positivism, Legal Realism, and Critical Legal Studies), the way in which they tend to depict justice, and how all of them seem to neglect the particular subject who demands it. This is the particular subject who appears, in the end, as a common blind-spot to all of them and as the basis for this study on the formation of particular understandings of justice, as is explained in Chapter Two. Here, the particular subject who goes before the law in the hope of attaining justice is put in relation to two basic characteristics of the law: generality and normativity. This relation reveals, in turn, subjectivity, contingency, and justice as constituent limits

of law qua system. Limits that, once considered along with the abovementioned characteristics of the law, open a window of opportunity for the study of three basic dimensions in the analysis of the formation of subjective understandings of justice: contingency, desire, and temporality.

The second block of the thesis is devoted almost exclusively to the study of each of these dimensions. Introducing the cases of Ángeles Pedraza and Irene Villa, Chapter Three addresses the way in which a life-altering contingency can be articulated, through a meaning-making process, into a narrative of justice that can oscillate between two extremes defined by Benjamin's concepts of *fate* and *character* –and respectively identified with the abovementioned cases. Chapter Four deals with the unconscious mechanisms that act as a driving force for the abovementioned meaning-making processes. These mechanisms oscillate, in turn, between *desire* and *jouissance*, and are once again identified with the cases of Pedraza and Villa. The last chapter of this block, Chapter Five, investigates the way in which a narrative and the unconscious mechanisms behind it can lead to the appearance of one or another form of temporality and a certain way of understanding justice that fluctuates between the Heideggerian concepts of *expectation* and *anticipation*.

The last part of this block, the Interlude, aims to clarify the connection among these three dimensions of analysis. Presenting them as three differentiable although deeply intertwined aspects of a single phenomenon (the formation of subjective understandings of justice), this section argues that such phenomena appear crossed by the two opposing poles considered in each of these dimensions. This interlude uses the extremes that were previously identified with the radically opposed ways of understanding justice embodied by the cases Ángeles Pedraza and Irene Villa, to demark a spectrum of possible ways of conceiving of justice in which a number of intermediate and arguably ideal positions could be located.

Finally, the Conclusion summarises this research's major findings while also emphasising its most relevant theoretical and methodological contributions. Among them, a particularly relevant finding is the possibility that a wish for vengeance may not appear, as it had seemed at first, as a result of an unfruitful interaction with the law in which the desire for punishment of the subject had been left unsatisfied.

Instead, it seems to emerge as the result of the presupposition that the law is completely unable to provide the subject with the kind of satisfaction sought. This entails that, insofar as the subject does not see the law as an authority capable of providing him with justice, there is no need for the subject to articulate a demand for justice. In other words, this presupposition leads to a lack of discursive interaction with the potential to prevent the emergence of a desire for justice from the very beginning. Besides this, the Conclusion also discusses the political implications and emancipatory potential of the kind of analysis developed throughout this thesis.

## CHAPTER ONE

### Legal Theory and Its Lacunae

"From all you have told me, dear brethren, make out clearly that though they have punished you for your faults, the punishments you are about to endure do not give you much pleasure, and that you go to them very much against the grain and against your will, and that perhaps this one's want of courage under torture, that one's want of money, the other's want of advocacy, and lastly the perverted judgment of the judge may have been the cause of your ruin and of your failure to obtain the justice you had on your side. [...] Moreover, sirs of the guard," added Don Quixote, "these poor fellows have done nothing to you; let each answer for his own sins yonder; there is a God in Heaven who will not forget to punish the wicked or reward the good; and it is not fitting that honest men should be the instruments of punishment to others, they being therein no way concerned.

(Miguel de Cervantes, *Don Quixote*, Part One, Chapter XXII)

#### **Why legal theory?**

The troublesome relationship between justice and the law haunts philosophy. It haunted Plato, and it keeps haunting us. The debate between Socrates and Thrasymachus in Plato's *Republic* regarding the "great question" –what is justice? – constitutes a perfect example of this. In their discussion, Thrasymachus claims that "justice is the interest of the strongest," and Socrates counter argues saying that justice is "everyone having and doing what is appropriate to him." Ultimately, Socrates' views had an enduring influence that can still be appreciated in Roman law under the maxim that defines justice as "giving each their due" –*ius suum cuique tribuere*. This influence also becomes manifest in the relatively recent revival of justice as a major philosophical issue: today, justice as "giving each their

due” survives in the work of John Rawls and some as his critics, such as Michael Walzer, Robert Nozick or Michael Sandel.

In the view of the above, it may seem “strange” to start a dissertation on justice with a literature review on legal theory. So why legal theory and not any of these recent theories of justice?

There are two main reasons for this. The first one is that these modern theories of justice do not face the question of justice head on, tending to displace it onto the spheres of liberty and equality. In this sense, authors such as Nozick, Sandel or Walzer have followed Rawls’ footsteps bringing about new theories in which they try to determine what is to be considered as just or unjust in a liberal socio-political context; normally, trying to reconcile liberty and equality under the label of “justice.” Nevertheless, and from the point of view of this research, referring the problem of justice to another problem –such as the troublesome relationship between liberty and equality– would constitute an unacceptable exercise of idle talk.

In talking about justice in these terms –as a balance between equality and liberty– “justice” itself remains concealed; an understanding of it appears as always already presupposed in these debates. This sort of idle talk “omits going back to the foundation of what is being talked about” (Heidegger, [1927] 2010, 163). Saying that a given balance between liberty and equality is “just” assumes that the idea of justice itself is already understood; and, nevertheless, the never-ending debate about the reasons why it is just or unjust conceals and precludes the debate about our very understanding of justice.

The second reason stems from the first one. In the work of these authors the definition of justice as “giving each their due” survives under various guises, as different balances between liberty and equality. Nevertheless, this understanding of justice as “giving each their due” always implies that we know who “each” is, what “their due” is, and who gives what; assuming that we know the answer to these questions entails, in the last analysis, that an understanding of justice is always already presupposed. However, the approach taken in the work of the abovementioned authors ignores the most relevant part: Who decides over these



questions? Who decides who is “each”? Who decides what is “their due”? And who decides who gives what?

These are the kind of questions that must guide us in our inquiry. And it is precisely because of these questions that the departing point of this dissertation can never be a literature review of debates about justice that presuppose an understanding of the term. Ultimately, this research cannot presuppose an understanding of justice that leaves unexplained who “each” is, what “their due” is, who gives what, and, most importantly, who decides over these questions.

Nevertheless, this questioning haunts every debate about justice, even if the meaning of justice itself is commonly left undiscussed. So if this research is to meet and address these questions, the circumstances that give rise to debates about justice are to be identified. Fortunately, the very etymology of “debate” sets us on the path to that goal: the Latin origin of “debate” as *dis-battere* – to fight apart, in different directions– reveals the importance of investigating the circumstances in which we “fight” over the meaning of justice. It compels us to investigate the circumstances in which different understandings of justice are put into question; the circumstances in which we become alienated from a presupposed understanding of justice. That is to say, the conditions of our everydayness under which we doubt who “each” is, what “their due” is, and who gives what: the conditions under which we turn to that who decides over these questions...to that who prescribes. If this research is to investigate the circumstances that give rise to debates about justice, it must turn its attention to the norms that establish the basic parameters of these debates. In other words, if this research is to address the question of justice head-on, it must take as a departing point the extant relation between norms and justice.

Undoubtedly norms can be found in almost every single aspect of human activity –games, language, religion, morality, etc. – but there is a specific type of norm that stands out in its relation with justice: legal norms. One may say that the rules of a given game are “unbalanced” and thus they are unjust; one could also say that the norms of a certain religion discriminate some of its followers and thus they are unjust, or even that the norms of a given language reflect a sexist bias among its speakers...and yet most debates about justice take place in a different sphere: in

the relation to the legal norms that crystallise and rule the social and political institutions of a polity.

Justice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust (Rawls, 1971, 3)

If we have a conflict with our fellow citizens and we cannot solve it by ourselves, we seek the mediation of the “administration of justice”, we go to the “courts of justice” –funded by the “Ministry of Justice” or the “Department of Justice” – in which we demand and plead for justice, and “a Justice” deals out justice. We seek justice in the law and the institutions that it regulates. Eventually, if we are left unsatisfied in our demand, we claim to be the victims of injustice...and in turn we deem these institutions and laws as unjust.

Gaining a better understanding of the question of justice requires a better grasp of the debates in which this question is discussed; and thus we need to analyse in depth the context in which these debates arise: we need to study the relation between justice and the law. Hence the departing point of this research is not this or that theory of justice, but legal theory and what it has to say about the relation between law and justice.

### **The role of the ordinary citizen**

This chapter began drawing our attention to the classical origins of current academic debates about justice, to the ways in which justice as “giving each their due” seems to hold sway over these debates. However, as was stated above, if this research is to address the question of justice in itself, instead of displacing it onto the spheres of liberty and equality, it must study the conditions that allow the emergence of a questioning of justice: it must study the ways in which legal norms and their application open a window of opportunity for this questioning at the same time that they affect our very understanding of justice. But what do the law and legal theory tell us about justice? What do they tell us about the relation between legal norms and justice? What do they tell us about the ways in which individual human beings relate to both justice and legal norms?

Once more, going back to the “classics” may help us cast some light on these questions. Justinian the Great (482 – 565), a Byzantine Emperor who gained fame among other things for building the church of Hagia Sophia and reconquering many of the former territories of the Western Roman Empire, left us another legacy of an entirely different nature. Namely, a series of judicial reforms and revisions of Roman law –*Corpus Iuris Civilis*– that gave shape to modern Civil Law: a legal system chiefly based on codification and still applied under various forms in around 150 countries. However, what is truly relevant about Justinian in this case is his understanding of the law. In his opinion the existence of every political community is essentially based on the law, which has its ultimate cause in the human person for whose sake it is made. To a certain extent this project aims to recover this point of view: focusing its attention on the relation between the law and the particular human being for whose sake it is –purportedly– made, and investigating the way in which this subject may come to understand the relation between law and justice.

In the light of Justinian’s views, this goal could seem rather trivial. However, as I will try to prove along these pages, that is not the case. Law is not a recent phenomenon and consequently many have theorised about its nature and functioning. This chapter will revisit four major currents of thought within legal theory: Natural Law, Legal Positivism, Legal Realism, and Critical Legal Studies – each of them respectively concerned about the content of the law, its form, its enforcement and its connection with power– with one simple question in mind: “What is the role of an ordinary citizen and his or her subjectivity in this theoretical edifice?”

Following this line of reasoning I will try to demonstrate two things: first, that most legal theories have symptomatically neglected the question of subjectivity and the role of ordinary citizens in the law by treating them as mere objects while focusing on the relationship between the law and legislators, judges, courts, etc. And secondly, that a psychosocial approach to the matter has the potential to bridge that gap in legal theory.

The object of study of legal theory is law as a universal socio-political phenomenon, and more precisely, as a normative social practice. And yet, law presents a series of particularities in this regard that make it radically different from

other normative practices. When compared to morals, for instance, one may feel inclined to think that what makes law different is its formal character: its codification, or its institutionalisation through the legislative and judicial powers. However, the uniqueness of the law as a social phenomenon lies in its radical normativity. Surely morals are normative too, but the role of the state monopoly on violence and the enforceability of the law introduce a significant qualitative difference between them. For that reason, even if some theories tend to focus on the content and form of legal norms –that is, on that which makes the law “lawful” or even just– this research supports the idea that what really lies at its core is the very lack of a substantive nature: that it appears, in the end, as pure normativity; as a formal command backed by state monopoly on violence; as the Great Dragon of the desert: *Thou shalt* (Nietzsche, [1883] 2006).

Any attempt to conceptualise the law requires a choice between different possible ways in which it can be conceptualised (Perry, 2001). What was said in the previous paragraph intends to meet such requirement, and surely different departing points could have been chosen, but this focus on normativity allows us to centre our attention on the interconnection between law and subjectivity with no further concerns about the validity of the law in reference to an external framework – namely certain ideals or morals.

Each of the following sections will be devoted to a specific current in legal theory along with its main ideas and representatives: Natural Law (Ronald Dworkin), Legal Positivism (Hans Kelsen), Legal Realism (Carl Schmitt) and Critical Legal Studies (Costas Douzinas, Drucilla Cornell). All of them will be analysed and criticised keeping in mind the fundamental question of this chapter regarding the role of an ordinary citizen and his or her subjectivity in legal theory. Finally these currents will be analysed altogether in relation to two of the hypotheses of this chapter: (1) that most legal theories have symptomatically neglected the question of subjectivity and the role of ordinary citizens in the law, and (2) that a psychosocial approach to the matter has the potential to bridge that gap.

## Natural Law

Among the four legal theories studied here, Natural Law remains as one of the oldest and most popular tendencies. Its basic premise states that independently of the positive law of any state there is an existing universal law determined by nature and discoverable by human reason. Therefore, as one may imagine, the main concern of Natural Law is how and why the law can provide its subjects with sound reasons to act in accordance with it: the main concern of Natural Law is thereby the judgement of the validity of the law according to an external theoretical framework.

Its origins can be traced back to the Stoics, who proclaimed that a rational being could live in accordance with a rational and purposeful universal order by means of natural law and virtuous action (Strauss, 1968). These ideas were further developed by Augustine of Hippo, Gratian, and especially, Thomas Aquinas and his *Summa Theologiae* –who saw natural law as the rational creature’s participation in the eternal law; but since the latter could not be fully comprehended by human reason, the former needed to be complemented by the Holy Scriptures. These first supporters of Natural Law put great emphasis on what was previously said about the need to judge every positive law in the light of its conformity to natural law, giving origin to the famous adage “*Lex iniusta non est lex*” –an unjust law is no law at all. According to these *iusnaturalists*, the validity of a law depends upon nothing but its accordance to a “higher order”. Moreover, following these authors one could even dare to say that, from the point of view of Natural Law, the very legal character of a law relies on its conformity to the higher order of the eternal law.

Thus, for these *iusnaturalists*, the law is meant to be radically teleological and equally deontological: if a law does not fulfil its mission of getting human persons closer to the divine, such a law is a failure and no law at all. The implications of this type of legal reasoning are enormous, having the potential to back, at the same time, the most radical and the most conservative juridico-political claims. Yet before getting to that point it is necessary to analyse some features of the evolution of this school of thought, and some key elements and authors in current theories within Natural Law.

Even if the origins of Natural Law can be traced back to the Stoics, its roots are eminently theological. Aquinas maintained that the eternal law is the rational plan

by which the creation is ordered, and natural law is the very way in which humans can freely participate in this eternal law –unlike irrational creatures who are directly determined by God’s plan (2006). Thus, for this doctor of the church, natural law is the basic principle of practical rationality, being universally and naturally binding –beyond any mundane positive regulation– due to its capability to guide us towards the particular and general good. Natural law is hence binding in two different ways: from God’s point of view, it is binding due to its position in the Divine Plan; and from a human perspective, it is also binding due to its graspable precepts of practical reason that lead us towards good. This means that from a theological perspective the laws of God always apply because God wills it; but, since these laws are not necessarily understandable to human reason, natural law needs to be complemented by the Holy Scriptures

It is easy to see that Thomas Aquinas’ views on natural law demand a very specific set of beliefs in order to be accepted –they make absolutely no sense from an atheistic or agnostic point of view– however, that does not make this school of legal thought unacceptable to sceptical readers insofar as Natural Law itself would undergo a process of secularisation over the centuries. Presenting its most basic premises in a more earthly way, Thomas Hobbes’ *Leviathan* describes natural law as “a precept, or general rule, found out by reason, by which a man is forbidden to do that which is destructive of his life, or takes away the means of preserving the same; and to omit that by which he thinks it may best be preserved” (Hobbes, [1651] 2005). This contractualist theorisation of natural law and Hobbes’ negative views on human nature –according to him, in the pre-contractualist state of nature there is a “war of every man against every man” and human life is “solitary, poor, nasty, brutish and short”– constituted a direct attack against some key aspects of the previous tradition, associating its purpose and idea of “good” to self-preservation and common good rather than happiness and virtue. However, Hobbes’ depiction of natural law would be revised later on in a more positive way by authors such as Cumberland, Pufendorf, Grotius –who would definitely detach natural law from theology with his argument *etsi Deus non-daretur*<sup>3</sup>– and Locke, who would turn Hobbes’ argument in favour of the rule of the sovereign –namely, that laws must be observed regardless of how tyrannical a sovereign could be, since tyranny is

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<sup>3</sup> Grotius meant that we should act as if God did not exist, or, at least, care.

better than the “war of every man against every man” in the state of nature— the other way round by saying that if a ruler went against natural law and failed to protect “life, liberty, and property,” his people would be justified to overthrow the existing state and create a new one (Locke, [1689] 2004).

Besides their common claims concerning the need for adequacy of the law to certain standards of validity in relation to a higher order, and despite their disagreement in some theoretical aspects, all these authors appear as precursors of modern secular Natural Law and, in consequence, we can perceive certain patterns and common elements throughout all of them: (1) that there is such a thing as a certain human nature, (2) that there are natural goods, and (3) that these goods precede every right in positive law. It does not matter whether one adopts a negative Hobbesian view of human nature, an Aristotelian perfective or completing approach, or a Platonic essentialist view, all claims in Natural Law rely upon the existence of a certain human nature that is intrinsically connected to the achievement of certain natural goods. Regardless of the approach, these goods are always knowable in Natural Law: “to show that the human good is grounded in nature is to show that human nature explains why certain things are goods, and it is hard to see how one could affirm that claim while entirely rejecting the possibility of derivationist knowledge of the human good” (Murphy, 2001). Not forgetting the fact that some have accused this derivationism of trying to conclude normative truths from a set of non-normative truths, most iusnaturalists agree that that problem can be solved or at least bridged by giving account of certain truths.<sup>4</sup> And, finally, in Natural Law these goods precede and are meant to be the foundation of every positive right

Natural Law theories maintain that a certain nature can be understood by understanding certain capacities inferred from acts, which in turn are understood in reference to their objects. Ontologically this implies that anything that is good for us is a result of our nature; epistemologically, that any understanding of our nature depends on an understanding of what kind of objects of choice are good for us. And, according to Natural Law theorists, every right in positive law must be preceded and based upon such natural goods.

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<sup>4</sup> What these “bridging truths” could be remains a mystery.

Both classic and contemporary texts treat the law as a morally problematic phenomenon insofar as it can be used either for the achievement of great good or as a tool for evil and tyranny. The most common solution to this problem is to utterly dismiss any law “used as a tool for evil” by denying its legal character. Even more utilitarian approaches to natural law face this dilemma: not putting it in terms of “good” and “evil”, but describing it as a “a sharp knife, whose sharpness makes it apt for life-saving surgery but equally for stealthy callous murders” (Raz 1979, 224–226). Therefore the key question for any theory within Natural Law is “Why is there a moral obligation of compliance to law?”

Most theories agree that the first and foremost reason to abide law is no other but the desirability of avoiding the Hobbesian state of nature and the war of every man against every man, creating the conditions for a “good life” by means of principles of practical reason –which, in turn, gain moral strength by being taken as a whole under the lead of categorical imperatives which depict other human beings as ends rather than as the means.

The most prominent among current Natural Law theorists is the recently deceased Ronald Dworkin (1931-2013), who, going against traditional Natural Law and yet moving away from positivism, maintained that morals and the law are not strictly separated, but related in an epistemological rather than ontological sense. His contribution to legal theory is chiefly characterised by his writings on moral principles and *interpretativism*,<sup>5</sup> his call for a moral reading of the American Constitution, his understanding of the law as a rule and principle, the right answer thesis, and some of his writings on topics such as liberty, equality and legality.

Dworkin’s *interpretativism* upholds that legal rights and duties are ultimately determined by a “scheme of principle” able to offer the best justification for the political practices of a certain community. A scheme that becomes graspable through the interpretation of these practices and the values that they are supposed to serve. In other words, Dworkin considers that legal rights and duties are but the product of a set of moral values and practices, and thus the content of the law and its validity depend on its harmony with a specific set of moral values and practices, leaving judges little space for discretion since they should always interpret any legal

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<sup>5</sup> Term coined by Dworkin.



materials following that specific moral scheme. And it is precisely from this that Dworkin infers his *right answer thesis*, maintaining that as long as the law is properly interpreted it will always give a right answer –although this does not imply that everyone will get to the same exact one. Accordingly, he also defends a moral reading of the American Constitution.

Despite the popularity of Dworkin's theories among many scholars, it is easy to see that there is a gap in his theoretical edifice between moral principles and legal rules that the author seems to save by some sort of leap of faith. However, he considers that this problem is solved by means of certain legal principles that exist as long as they are derived from the best moral and political interpretation of pertinent legal materials, bridging the gap between moral values and legal facts. Surely the whole idea of the existence of these legal principles –stemmed from moral values and legal facts, and capable of bringing together these separate spheres– could appear as an empty construction masking an actual leap of faith, since from his point of view moral principles are what they are on the basis of their content, legal rules are solely dependent on their institutional source and enactment, and legal principles become valid due to a mix of both requirements (Dworkin, 1998). However, even if this lack of substantial content in legal principles represents a significant flaw in Dworkin's theories, it is but one of the many criticisms that can be made to both Dworkin and Natural Law.

Taking in consideration the direct and intimate connection between law and morals in Dworkin's work –an epistemological rather than ontological connection in his view– it seems clear that, for him, the validity and binding force of the former stems from the latter: *Lex iniusta non est lex*. The binding force of the law is entirely content-dependent and relies on its adequacy to a very specific set of moral values, acting in this manner as a proxy between a higher order and the mundane issues of everyday life. However, if Thomas Aquinas theories were controversial due to their theological character, the same could be said about Dworkin and other contemporary Natural Law scholars. Not because their theories are based on a certain belief in God, but because their theories are based on a *secularised* belief in God: morals. If Aquinas' views were unacceptable for atheists and agnostics, contemporary Natural Law theories are just as unacceptable from a sceptical or

relativist stand towards morals. Ultimately, these theories are utterly flawed unless these authors' belief in morals is shared.

There are plenty of criticisms that could be made with regard to this secularised belief in God, but I would like to highlight just two of them that I consider significantly relevant to the topic and do not require having to go through a whole “genealogy of morals.” The first and more obvious one is that making the law depend on morals immediately raises a question about the very existence of morals. Explaining the validity and binding force of the law by referring to morals or God does not solve this quandary at all, for the only thing accomplished by doing so is to defer and mask the problem by alluding to a different theoretical framework: “if a law becomes binding because it stems from a set of moral values...what makes these values binding?” Undoubtedly, some Natural Law theorists would argue that these values point towards certain “goods,” however, a questioning about what makes these goods desirable would follow, thus any further reasoning in that direction would inevitably lead to a sterile debate in which the critical question remains postponed ad infinitum. In Natural Law the validity and binding force of the law is explained through a succession of empty frameworks (moral values, natural goods, human nature, etc.) that could lead us either to a sterile debate where the key question is eternally postponed, or to some sort of tautological reasoning (this law is binding because it stems from these moral values, which are binding in turn because they help us to reach certain natural goods that are worthy to be legally protected). Nevertheless, what seems to lurk behind all these attempts of rationalising the law in the light of morals is a clear and cold “because I – the law, morality, God– say so”: what lurks behind the rationale of Natural Law is the bare draconian *thou shalt* described by Nietzsche in *Thus Spoke Zarathustra* ([1883] 2006).

Scholars working in the field of Natural Law defend the moral imperatives that must guide the law, but do not question their nature, for they consider that moral principles are what they are due to their content, and their validity is purely content dependent (Dworkin, 1998). Nevertheless, this reasoning –upholding moral values as the ultimate goal and primary source of the law– reveals something else; namely, a deep-rooted ideological bias. Following the account of ideology provided by Louis Althusser in *Ideology and Ideological State Apparatus* ([1970] 2001) one

could easily argue that these claims are ideological inasmuch as they maintain that laws must stem from morals, although these moral values remain as an empty signifier ready to be used in the best interest of the law maker and the judiciary. Undoubtedly, some may disagree about morals being a set of empty signifiers –due to their purportedly graspable character through an understanding of the social values and practices that they entail– but it is important to remember two things: first, and following Nietzsche in *On Genealogy of Morals* ([1887] 1994), it would be naive to consider such values and practices as innocent or neutral; and second, the universal acceptance and validity of such values is highly questionable, and thus, their legal enshrinement may appear as a radically ideological imposition.

This ideological bias in Natural Law makes it highly susceptible of being used for conservative and radical political projects alike. It has the potential to back political agendas as different as the American Declaration of Independence written by Thomas Jefferson –Article I: All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness– or the anti-abortion agenda supported by Ronald Reagan –“More than a decade ago, a Supreme Court decision literally wiped off the books of fifty states statutes protecting the rights of unborn children. Abortion on demand now takes the lives of up to 1.5 million unborn children a year. Human life legislation ending this tragedy will some day pass the Congress, and you and I must never rest until it does. Unless and until it can be proven that the unborn child is not a living entity, then its right to life, liberty, and the pursuit of happiness must be protected.”

Although all these criticisms reveal important flaws in Natural Law, the most relevant one from the point of view of this project is yet to be made. Here, the question about the role played by an ordinary citizen and his or her subjectivity in this theoretical framework exposes a new flaw in Natural Law, for in the face of its thorough focus on the content of the law, its recipient –the ordinary citizen– becomes a purely passive object, appearing as a means for the achievement of moral-ideological ends. In Natural Law the human element is restrained to the legislative and judicial powers, which are meant to write and interpret the law in the light of certain moral values, whereas the ordinary citizen and the question of

subjectivity remain utterly irrelevant in their role as lifeless objects. In Natural Law, citizens are reduced to an ignorable contingency.

It would be unfair to say that citizens are completely ignored by Natural Law – after all, they surely have their own values and opinions regarding the principles that should inform positive law. Nevertheless, in Natural Law this human element is reduced to its minimum: citizens are only relevant to the extent that they represent the material embodiment, the vessel, of a certain morality...but nothing else. On the contrary, this project aims to subvert this situation by taking these citizens in their “ignorable contingency” as a departing point for the study of the relation between law and justice.

### **Legal Positivism**

In contrast with Natural Law –which is mainly concerned with the moral content of the law– Legal Positivism focuses on the form of the law in order to determine its validity. Rejecting the necessity of any sort of metaphysical assumptions, Legal Positivism establishes that the binding nature of the law does not depend on its content, nor does a law stop being legal due to its merits or demerits. The first renowned legal scholar to propose such a daring view against historically mainstream Natural Law was John Austin (1790-1859), who claimed in *The Province of Jurisprudence Determined* ([1832] 1998) that “(t)he existence of law is one thing; its merit and demerit another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry.” Thus it is easy to see what stance is taken in Legal Positivism from its very beginning: A law is not law because it is good, just or moral. A law is a law because it is the law.

The logics underpinning Natural Law and Legal Positivism are radically different, for while the former bases the binding and legal character of the law on an external judgement of morality –goodness, justice, religion, etc. – the latter bases it on an internal judgement of formal validity: a law is legal and binding if it is passed in the right form by the right institution following the right procedure. Legal Positivism does not deem the merits of the law to be unimportant or irrelevant, it simply says that they do not determine whether a law is legal or binding –thus rejecting the legal maxim given by Thomas Aquinas “*Lex iniusta non est lex*”. This

leap, from Natural Law to Legal Positivism, can only be understood as the legal echo of the transition to modernity. That is to say, as the legal mirror of the transition from substantive to formal ethics fostered by Kant's categorical imperative: *Du kannst, denn du sollst* –“You can because you must.”

In Legal Positivism, the law is not to be obeyed due to its inherent goodness or its relation to a higher moral order, but due to the sheer fact of it being law. However, Legal Positivism can hardly be considered to be a unified theory, and albeit they have not been officially established, it is possible to identify at least three different currents of thought within Legal Positivism: Radical Legal Positivism, Legal Formalism, and Legal Pseudo-Realism. The first of them finds little –if any– academic support, yet it is remarkably common in popular culture and everyday life. Radical Legal Positivism (RLP) is a full-fledged inversion of Natural Law, for in opposition to the requirement of a law being just or moral in order to be considered as legal, RLP establishes that legal equals just, good or moral: whatever that is established by law is good. Such a stand lacks academic support (either from the point of view of legal theory or moral philosophy); however, it is largely supported in media: how many times do we hear in the news the use of the term “legal” as a synonym for “good” or “just”, and how many times do we hear the use of the term “illegal” as a synonym for “bad” or “unjust”? Such usage is certainly widespread despite its lack of support among scholars, so one could wonder –as Critical Legal Studies fittingly does– about the ideological motives behind a reasoning that places the state at the level of God, law at the level of religion, and legal theory at the level of theology. Notably intriguing and appealing, the study of this form of Legal Positivism deserves a more careful and serious consideration that, unfortunately, exceeds the scope of this research.

The other two currents could be identified either as Legal Formalism and Legal Pseudo-Realism, or as Continental Legal Positivism and Anglo-American Legal Positivism. The rationale for calling them Legal Formalism (LF) and Legal Pseudo-Realism (LPR) is that whereas the other classification could obey what may seem an artificial distinction –for instance, one can easily imagine an American scholar basing his or her theories on the work of Hans Kelsen, and a French or German one basing his or her writings on Joseph Raz's theories– this chapter opts for adopting an arguably more fair approach strictly based on the content of such theories. As its

very name shows, LF is chiefly concerned with the form of the law, whose legal and binding character depends on it being passed in the right form, by the right institution and following the right procedure. The most prominent author within this particular current of thought is Hans Kelsen, whose theories and most relevant writings will be analysed in this section. However, a brief overview seems right in order to gain a sense of the existing differences between this approach and LPR.

Legal Formalism can be easily seen as Legal Positivism at its purest: as a theory that upholds that the legal and binding character of a legal norm is strictly dependent on the law and its form, alien to any further consideration regarding morals, people or politics. It places law as a separate sphere or system that, while appearing profoundly connected to those of economics and politics, remains independent from them. The most relevant work in this field is Kelsen's *Pure Theory of Law*, first written in 1934 and considerably expanded later on in 1960. Presenting the law as a chiefly hierarchical phenomenon, this book argues that the hierarchical character of the law acts as a binding norm in and by itself: every norm in a legal system is derived from the *Grundnorm* or "basic norm" –usually likened to the constitution of a given legal system– which is at the same time the base and top of the legal pyramid. All norms derive from it and owe their validity, legality and binding character to their accordance to the Grundnorm, hence enclosing the legal system in itself, and making it blind to any extra-legal source –whether that source is God, morals or politics.

Legal Pseudo-Realism, on the other hand, found greater echo among analytic philosophers and Anglo-American scholars. I have chosen to name this current of thought as LPR since it appears to stand in a middle ground between Kelsen's pure formalism and other theories that could be placed within Legal Realism. Although this current also rejects the metaphysical presuppositions of Natural Law, it can be differentiated from LF inasmuch as its main focus shifts from the formal requirements of the law and its place in the hierarchy of the legal system, to the social facts and structures of government that permit its very existence. Here, unlike what happened in Kelsen's theory, the spheres of law and politics are much closer to each other in an almost-symbiotic relationship. The most prominent supporters of LPR are H.L.A. Hart and Joseph Raz.

On the one hand, Hart considers that the law cannot find the ultimate ground of its authority in force, morals, or in law itself. The difference with Kelsen is clear, for any sort of Kantian transcendentalism is rejected in favour of a more empirically-based approach. According to Hart, the authority of the law is intrinsically social: no imaginary pre-established Grundnorm can be its source of validity, but only customs and effective social practices. On the other hand, Raz takes a slightly more Kelsenian approach, arguing that the law is to be seen as a legitimate authority if its legitimacy can be determined in its own terms –instead of being derived from evaluative concerns such as morals. This explains why Joseph Raz eventually entered in a debate with the late Ronald Dworkin –as well as some morally inclusive trends in Legal Positivism–concerning the positivist or anti-positivist nature of the law, while also standing between Kelsen’s pure formalism and Legal Realism.

The theoretical roots of these three prominent authors –Kelsen, Hart and Raz– can be traced back to some aspects of Hobbes’ contractualism, and the works of Hume and Jeremy Bentham. Some of Bentham’s theories were eventually adopted and re-elaborated by John Austin who, as it was previously said, became the actual precursor of Legal Positivism: the first legal scholar to openly challenge Natural Law and consider law as a mere social construction. However, most legal scholars lost interest in Austin’s positivism by mid-twentieth century, and it would not be until Kelsen’s *Pure Theory of Law* that Legal Positivism would regain its lost importance.

As stated above, *Pure Theory of Law* was first written in 1934 and then expanded in 1960. In this book, Kelsen describes the law as a highly hierarchical structure that places this very hierarchy as a *de facto* binding norm: every norm in a legal system must be derived from the *Grundnorm* or “basic norm” –commonly assimilated to the constitutional text of a given legal system– which stands simultaneously as the base and top of the legal pyramid. All norms derive from it and owe their validity, legality and binding character to their accordance to the Grundnorm, enclosing the legal system in itself and making it blind to extra-legal sources –unlike Natural Law. This is considered one of the most original contributions ever made to legal theory, and it distinguishes between the static and dynamic aspects of the law: the former establishes that individual legal norms are

related to each other in a superiority-inferiority basis; and the latter analyses the relationship between law and the sphere of the political, and, more specifically, its relationship with the legislative power of the state. In this aspect, law is eventually recognised to be politically and ethically charged due to the debate that takes place in the process of writing and passing laws. And it is precisely this dynamic aspect of the law that leads Kelsen to identify it with the state as a single entity that relates to other entities –other nation states– in a considerably more “primitive” way through international law.

In relation to the previous section of this chapter, Legal Positivism can be seen as a rejection of the inherent ambiguity of Natural Law insofar as the metaphysical assumptions of the latter –regardless of their religious, political, moral or ideological character– can easily be seized and used for particular interests and goals. Nevertheless, even if Legal Positivism –and, more precisely, the work of Kelsen and his Legal Formalism– provide a neat and sharp critique of Natural Law, it creates some new problems of its own.

One of the criticisms that can be made from the point of view of this research is its top-down approach. According to Kelsen, the law is an indirect system of guidance that compels the courts of justice to apply certain sanctions if certain deeds are committed. Instead of telling citizens what to do, Legal Positivism upholds that the law is meant to tell judges and courts to treat these citizens on the basis of their actions and the existing legal stipulations. Much like Natural Law, Legal Positivism reduces citizens and their subjectivity to mere passive objects, utterly insignificant to the functioning and ends of the law. Thus one might wonder about what sort of argument could be provided by Legal Positivism in order to justify the prohibition of certain behaviours and conducts.

From a Kelsenian perspective, the answer would be that such prohibitions are fully justified due to their compliance with a higher norm and, ultimately, with the Grundnorm. As can be seen, such an answer is purely formal and lacks any sort of substantive content, making it a target of harsh criticism from the point of view of many theorists ascribed to Natural Law. In response to these criticisms Kelsen recognised the presence of a certain ethical and political element in the debates prior



to the passing of a law; but in his opinion such features should remain irrelevant from a normative point of view.

The question of normativity, however, is not exempt from criticisms and intense debates either. In this matter Kelsen upheld that the law is essentially normative and that the normativity and validity of any legal norm stems from its compliance with the Grundnorm. His views gave rise to fierce objections coming from legal scholars subscribing to Natural Law and Legal Realism: mostly against the very idea of the Grundnorm. From the point of view of Natural Law, if a law is considered to be valid because it has been written and passed in a legally established form, following a legally established procedure by an institution that is legally established and constitutionally recognised...what happens with this constitution or Grundnorm? How is it established? Where does its authority come from? And since Kelsen would reply that such authority is “presupposed” and that the first constitution is to be obeyed, one could wonder if, in the end, he is simply upholding it as “good” or “just”, and thus concealing some sort of Natural Law by means of a mirror-game in which the validity and bindingness of any law is explained by referring to another.

On the other hand, from the point of view of Legal Realism, the question of the Grundnorm seems just as dubious. Even if we were to accept Kelsen’s claims on legal validity being exclusively dependent on the compliance of legal norms with the Grundnorm, certain aspects such as the origins, nature and authority of the latter would remain utterly unknown and unexplained –unless it was simply accepted as purely “given” or “presupposed”. The question of sovereignty remains unanswered and symptomatically ignored in Legal Positivism and Kelsen’s theoretical edifice. Such is the origin of one of the most relevant controversies in the history of legal theory: that between Hans Kelsen and Carl Schmitt. Whereas the former considered the state and the law as the same entity, the latter saw the law as a by-product of the state and the sphere of the political. In this debate, that started in the 1920s and would continue after the death of Hans Kelsen in 1973, Schmitt tried to point out what appears as a clear void or blind-spot in Kelsen’s theory: he tried to ‘crack the mirror’ and put an end to the tautological reasoning by which the validity of any law is explained through a reference to another law *ad* Grundnorm –which apparently is self-explanatory– by putting emphasis on the question of sovereignty and the origins of such Grundnorm. According to Carl Schmitt, whose main ideas

will be further explained in the following section, the foundation of the Grundnorm is radically political and has its origins in the sovereign who –against Kelsen’s views– is considered not to be that who rules in normal circumstances of legality, but that “who decides on the exception” (Schmitt, [1922] 2005): not just by governing the polity in the exception, but also by deeming certain circumstances to constitute an exception. Despite his disagreements with Schmitt, Kelsen himself partially acknowledged such a notion of sovereignty by accepting that judges and tribunals are compelled to decide over any matter they are competent to, even in the presence of a legal lacuna, which they must fill in order to grant the rule of law and the efficacy and stability of the whole legal system.

The mirror game proposed by Kelsen places Law in a separate and autonomous sphere, alien to political facts and questions on subjectivity, giving rise to questionings concerning the efficacy of the law and its enforceability –for even if a law is perfectly written and passed following Kelsen’s scheme...could it be still considered to be law if it is not *de facto* enforced?

### **Legal Realism**

The question of the efficacy and enforcement of the law is, precisely, the main concern of Legal Realism; and whereas Natural Law and Legal Positivism could be respectively identified under Thomas Aquinas’ maxim “*Lex iniusta non est lex*” and the Kantian “*Du kannst, denn du sollst*”, at this point we can revisit Goethe and rephrase Faust’s reply to Mephisto ([1808/1832] 1993) in order to crystallise Legal Realism in one phrase: “*Die Tat ist alles, nichts die Form(sache)*” –the deed is everything, the (legal) form nothing.<sup>6</sup> There is a permanent dialogue and debate among these three schools and following it one may see how, for instance, Legal Positivism appears as an answer to Natural Law’s metaphysical ambiguities, and, in turn, Legal Realism as a response to Legal Positivism’s concealed metaphysical assumptions. Each of them tries to fill a relevant void in the theoretical edifice of the other two by emphasising the content, form and validity, or efficacy of the law.

The ultimate goal of Legal Realism is to analyse law in purely factual terms. Instead of focusing on the adequacy of its content to a given set of moral values or

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<sup>6</sup> The original quotation says: *Die Tat ist alles, nichts der Ruhm* – “The deed is everything, the fame nothing”

its formal validity, it puts emphasis on the efficacy of the law and how it is implemented and enforced. From the point of view of Legal Realism a law that is not enforceable can hardly be considered to be a law, and thus one may imagine the case of a hypothetical immaculate law in terms of morality –e.g. a law that may compel every citizen to be “nice and friendly” to other citizens– or a formally perfect law –e.g. the case of a legally recognised parliament that passes under the right form and following the right procedure a law reversing the law of gravity– which would be absurd in the end due to its lack of enforceability, and consequently could not be considered as properly normative and legal in the terms of this perspective. Legal Realism emphasises the normative character of the law in an external judgement of efficacy, and by doing so it also casts doubts about the ultimate relevance of the external judgement of morality fostered by Natural Law and the internal judgement of validity defended by Legal Positivism.

However, this current of thought helps us realise a point that is essential to the aim of this research: the displacement of a certain set of beliefs that takes place in the production of every legal theory. In this sense Natural Law underwent a process of secularisation that shifted its emphasis from religion and the belief in God to morality and natural goods, and yet they could be seen as the same set of beliefs expressed under different names as a consequence of the progressive secularisation of Western societies. From this perspective one could understand the development of Legal Positivism as a final attempt to put God out of the question, but the auto-referential explanation of the authority and binding power of the law provided by Kelsen can be read, in turn, as the attempt to allocate –positive– law the role previously played by God in Natural Law. Therefore we may wonder if, in this Kantian turn towards formal imperatives, Legal Positivism is but placing God –*qua* specific set of beliefs or ultimate justification– in a different guise: sweeping God under the carpet of the Grundnorm.

In this regard, Legal Realism can be understood as a Nietzschean turn that actually tries to kill God in legal theory: as a theoretical framework that asserts the importance of the “is” in opposition to a metaphysical or tautological “ought to be”. Certain sets of beliefs are displaced in the switch from Natural Law to Legal Positivism...but does that apply to Legal Realism as well? In order to answer that question it is important to consider whether we are reading Legal Realism in a

descriptive or normative way. Surely the normativity of the law is in the very kernel of this theory, and still that does not imply the normativity of the theory itself. As has been said, Legal Realism emphasises the difference between “is” and “ought to be”, and for that very reason it is profoundly descriptive in comparison with other schools of legal thought –especially Natural Law. A descriptive reading of Legal Realism provides us with an invaluable analytical tool for critical thinking –as many authors such as Giorgio Agamben, Chantal Mouffe, Jacques Derrida, Antonio Negri or Slavoj Žižek *have proved in their readings of Carl Schmitt*– but if the approach taken is a normative one –“things ought to be like this because this is how they are” – it is very hard to imagine a more conservative and despotic system of thought. If Legal Realism is read in this fashion, there is –as happened before with the secularisation of Natural Law and the development of Legal Positivism– a displacement of a set of beliefs. If Legal Realism is read in a normative way, the sovereign becomes invested with the powers and authority of God.

The use of these theological expressions is no coincidence. They have been deliberately chosen for one simple reason: the importance given to “political theology” in the work of Carl Schmitt, one of the most prominent authors in Legal Realism –and the one which this section will focus on. However, before dipping into Schmitt’s system of thought it is important to mention and briefly summarise the development of a parallel line of development in Legal Realism: the school of American Legal Realism –first developed in United States in the early 20<sup>th</sup> century and constituting an open attack against the positivism that considered law as a self-enclosed system uncontaminated by politics, economics or morals. The most relevant of its forerunners was Oliver Wendell Holmes, Jr., who in his book *The Common Law* ([1881] 2007) denounced the pretensions of depicting law as a science by stating that “(t)he life of law has not been logic; it has been experience.” Over the course of his life, Holmes would maintain that Law is what the courts decide, and nothing else.

Holmes remains important in the context of this chapter for two different reasons. The first one is that his view on the law as that which the courts decide combined with his theory of “the bad-man” – for whom a legal duty is but “a prophecy that if he does certain things he will be subjected to disagreeable consequences by way of imprisonment or compulsory payment” (ibid.) – is the

closest approach that we can find to the main concern of this chapter: the role played by an ordinary citizen and his subjectivity in legal theory. The second reason is that the importance given to judicial decisions in his work directly connects him with Carl Schmitt and his theory of the sovereign, placing the judge in a central position due to his capacity to decide on the exception created by the ultimate indeterminacy of the law.<sup>7</sup>

However, in Schmitt the question of sovereignty is not limited to the role of judges and courts in the enforcement of the law –which may depend on highly arbitrary factors such as the mood of the judge at that moment– but exceeds this micro level and flows into politics at a macro level –where, in a realist fashion, and following Mao Zedong, “political power grows out of the barrel of a gun” and the law would be but the rationalisation of such power (Derrida, 1990).

Independently of the level and magnitude of the indeterminacy we are dealing with, the “sovereign is who decides on the exception” (Schmitt, [1922] 2005). The sovereign governs *de facto* in the exception, but what is even more relevant is that he also determines the exception itself: an emergency situation has to be politically deemed as exceptional in order to be considered as such. Nietzsche, in his notebooks, stated that there are no facts, only interpretations; and the same thing can be said, *mutatis mutandis*, about the exception in Schmitt: that there are no situations of exception, only a political interpretation of situations as exceptional. The emphasis placed on the question of sovereignty and the exception is meant to crack the mirror game in Kelsen’s theory by undermining what seems to be a self-referential Grundnorm and a tautological reasoning that aims to legitimise any law by referring it to further laws *and* that self-referential Grundnorm.

In opposition to Kelsen, Schmitt’s main concern is the foundational moment and conditions of Law, for according to him that who manages to govern on the exception is capable of creating the conditions of possibility and guiding lines for the legal normality that follows it. The exception is a moment of pure “mythic violence” (Benjamin, [1921] 1996) by means of which a decision is made and a

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<sup>7</sup> The question of the indeterminacy of the law has been one of the most important debates in legal theory in the last few years.

new juridico-political order is established. At a micro level the functioning of the exception can be explained using the following imaginary case:

There is a minor parent whose baby urgently needs a kidney transplant in order to survive. Nevertheless, the problem is that despite this minor parent being the only potential donor and the only chance of survival of the baby, a law aimed to protect minors forbids them from donating organs; therefore –at least in principle– such a transplant could not be made.

A judge influenced by Legal Realism would create a legal lacuna –an exception– in order to save the baby. In order to protect a public good such as life, the judge could step out of the rule of law by arguing its indeterminacy; stating, for instance, that this specific law does not say anything about “minors who have their own children” and that due to this indeterminacy and his obligation to make a decision, he hereby authorises the transplant in order to protect the constitutionally established value of “human life”. Going back to Goethe’s *Faust* we may dare to say “Law is mighty, mightier necessity.”

Notwithstanding the potential reading of the case in terms of values and Natural Law, the relevant point is that here the judge –*qua* member of the judicial power, and thus as a power of the state– creates an exception, governs on it, and puts himself in the place of the sovereign: the place of that able to decide in matters of life and death. This correlation between sovereignty and the exception also applies to what happens at a macro level, as Giorgio Agamben illustrates in *State of Exception* (2005), when he puts the example of American politics post September 11 attacks in 2001. The decision over life and death, the “right to bare life” –“*vita nuda*” in Italian, and “ζωή” or “*zoe*” in Greek, is pure biological life absent of any political value per se– is also developed by this author in *Homo Sacer: Sovereign Power and Bare Life* (1998), where he agrees with some of the views provided by Derrida in *Force of Law* (1990) concerning how the state can commit acts of pure violence for the sheer need of self-legitimation. According to Agamben, the sovereign who governs on the exception and commits such acts of pure violence creates the “homo sacer”, “a being that cannot be ‘murdered’ or ‘sacrificed’ but just killed” (Agamben, 1998), for the bare life of the homo sacer lacks any sort of political symbolism in itself: it is an object, a mere means towards the consecution of an end, self-legitimation.

Thus it is clear that for Schmitt and all those authors influenced by him – Agamben and Derrida among them– law is a highly political phenomenon. According to *The Concept of the Political* (Schmitt, [1927] 2007), the political is not reducible to party politics: on the contrary, it is the very kernel of politics and overflows its own field reaching and contaminating spheres such as that of economy, religion or law. The political appears wherever there is a friend-enemy distinction, and the law does so by introducing differentiations such as that between “victims” and “criminals”. This view is summarised in one of the letters sent by Leo Strauss to Schmitt in 1932: “Because man is by nature evil, he therefore needs *dominion*. But dominion can be established, that is, men can be unified only in a unity against other men. Every association of men is necessarily a separation from other men... the political thus understood is not the constitutive principle of the state, of order, but a condition of the state” (1995).

Strauss’ summary of Schmitt’s views reveals something that remained concealed in previous legal theories until now: the ideological character of the law. However, and although Schmitt was the first to hint at such a possibility, he did not take his analyses any further in that direction. It would not be until the development of Critical Legal Studies in the 1970s and 1980s that this feature of law would be studied in greater depth.

Many criticisms can be made of both Legal Realism and the work of Carl Schmitt: from the point of view of Natural Law it could be argued that the sheer effective enforcement of a law does not make it legal, for it may not respect –or even go against– certain moral values, becoming thus an instrument for tyranny. From the point of view of Legal Positivism it could be said that the mere enforcement of a norm that lacks the necessary legal requirements to be considered “law” would be no different from criminal actions committed by mafias or any other criminal organisations. And from the point of view of this research project, and even if Legal Realism is not completely blind to the human factor –insofar as it recognises the relevance of the judge and whoever places him or herself in the place of the sovereign– just as has happened with Legal Positivism, it can be accused of potential conservatism and of repeating the same top-down scheme adopted by other schools of legal thought due to its focus on the figure of the sovereign: it is a double-edged blade wielded by the sovereign over the head of its subjects.

Therefore, albeit all these arguments make perfect sense from the point of view of their respective theoretical frameworks, and although they admittedly contain elements of truth, the theoretical usefulness of Legal Realism cannot be so easily dismissed.

After all, Legal Realism was the first legal theory to look at the actual functioning of the law and its relation to politics without any concealed or unconcealed moral reservations. And that is the reason why it has the potential to justify, at the same time, the highest and lowest political goals: “He who fights with monsters should look to it that he himself does not become a monster. And when you gaze long into an abyss the abyss also gazes into you” (Nietzsche, [1886] 2002).

### **Critical Legal Studies**

The current in legal theory known as Critical Legal Studies (CLS) is slightly different from the other schools of thought we have seen so far, and also the one that stands closer to the approach taken in this thesis. Natural Law, Legal Positivism and Legal Realism are in permanent communication and debate, contradicting each other in the terms respectively emphasised by each of them: moral content, form and validity, and efficacy and enforcement. Although in permanent debate, these positions are not mutually exclusive in every aspect, and we may imagine different combinations of two of them that set aside a third one. Therefore a combination of Natural Law and Legal Positivism prioritising the moral content and formal validity of the law would dismiss many of the insights provided by Legal Realism inasmuch as such combination would deem them as pure extra-legal violence. A combination of Natural Law and Legal Realism would exclude from its theoretical framework the emphasis on the form and validity of legal norms fostered by Legal Positivism, since what would really matter for that approach is nothing else but the ends of the law and the efficacy of the means to achieve its ends. And, finally, a combination of Legal Positivism and Legal Realism would give birth to a rejection of the possibility of legal norms having to be informed by moral values in their content, for what would matter from such a point of view is the inner validity of the law and its effective application.

Although it is possible to be exclusively ascribed to any of the legal theories described so far, it is difficult to find a justification of the functioning of a whole



legal system combining these three approaches; more commonly, we find a combination of two of them in opposition to a third one. So if these theories are related to each other in such an intense way, what happens with CLS?

The origins of CLS can be traced back to the 1970s with the work of the “Conference on Critical Legal Studies” in the United States and other similar groups operating in different countries around the world, such as the Critical Legal Conference in Britain in 1984. Influenced by American Legal Realism and the radical political culture of the 1960s, CLS was born as an attempt to “make the law free” (Thoreau, [1854] 1993), to re-humanise both the law and legal institutions by vacating them of concealed class-domination interests (Turley, 1987).

Rather than being concerned with positing a “correct” legal theory or method, CLS criticised the purported neutrality of mainstream legal theory, calling for political commitment among legal scholars, while also avoiding sectarianism. And although the theoretical edifice of CLS is far from being either homogeneous or unified, it is possible to highlight certain features that give a minimal cohesion to this movement. Namely, that law is politics, that the law is political, that it is ideological, that its inner assumptions are not clear, and that the law is also ultimately undetermined. In the first place, CLS refuses to accept that law and politics could be considered as entirely separate spheres: despite differing in some aspects, both of them belong to the same “superstructure” aiming to guarantee the existence of a certain political community by granting the reproduction of its relations of power and domination. Nevertheless, from the CLS point of view, the law goes beyond “politics”: it is also “political” inasmuch as it relies upon a series of binary oppositions such as that of “victim” and “criminal” –following the friend-enemy distinction provided by Carl Schmitt. Stemming from the previous two points, CLS also posits that the law is radically ideological insofar as it preserves the interests of those in power by depicting itself as a means of protection for those who are not. In addition to that, for many CLS scholars some of the most common assumptions in law are rather questionable –e.g. the hegemonic liberal understanding of citizens as fully autonomous and rational individuals, unconditioned by external factors such as politics, economics or the law itself. And, finally, CLS also embraces one last feature of Legal Realism in its defence of the ultimate indeterminacy of the law: upholding that there is an unbridgeable gap

between the abstract formulation of the law and its concrete application, constituting in this way an “exception” in which the government of the judge *qua* sovereign –as a power of the state– is established.

In short:

The central focus of the critical legal approach is to explore the manner in which legal doctrine and legal education and the practices of legal institutions work to buttress and support a pervasive system of oppressive, inequalitarian relations. Critical theory works to develop radical alternatives, and to explore the debate of the role of law in the creation of social, economic and political relations that will advance human emancipation. (Fitzpatrick and Hunt, 1987, 1-2)

In the opinion of Simon Crichtley, philosophy commences with disappointment (2008), and the same could be predicated for CLS, whose departing point is defined by its disaffection with traditional legal theory. However, some scholars ascribed to this current –such as Alan Hunt– invite us to reflect on the future of CLS after this “reactive” beginning: “Can it go beyond its reactive origins and develop a viable alternative theorisation?” (Fitzpatrick and Hunt, 1987)

Unsurprisingly, the difficulty of moving on and setting aside this reactive genesis has generated several conflicts among CLS scholars over the years: “Despite its youth, CLS has generated many histories of the movement itself in such a way that it is not only frequently and accurately characterised by its inwardness but is also depicted theoretically in terms of an uneasy self-referentiality” (Schlegel, 1992 as cited in Douzinas, Goodrich and Hachamovitch, 1994, 7). Nevertheless, CLS does not seem to be sentenced to an eternity of stagnation and self-referentiality. Over the decades it has managed to move from a preliminary emphasis on Marxist sociological theory, to structuralism following the works of Levi-Strauss and Althusser, and, finally, to a last stage in which it has switched to more modest political goals: gradual institutional reforms (Ibid, 9-13).

In a certain manner, what we are witnessing here is a timid return of CLS to the shadow of traditional legal theory, for albeit it recognises contingency as the condition and limit of legal judgement, it fails to address critically the question of justice and subjectivity in a time in which legality and morality are normally separated: “In formal terms justice is identified with the administration of justice

and the requirements and guarantees of legal procedure. In substantive terms justice loses its critical character and acts not as a critique, but as critical apology for the extant legal system” (Ibid, 18). However, not all the scholars ascribed to CLS face this problem in the same way.

Some, like Roberto Mangabeira Unger (1987), have addressed the question of justice indirectly, focusing their attention on the contingent and historical character of certain legal institutions that we tend to hold as natural, timeless, or universally valid. And, arguing that these institutions produce a certain form of knowledge in order to portray themselves as natural and ahistorical, they seek to invert the relation between such institutions and the living-breathing subject through a process of empowerment.

Other authors, however, have taken a more head-on approach to the relation between law and justice. In this regard, we can find Costas Douzinas and Drucilla Cornell in opposite poles of the debate. In the opinion of Douzinas (1994, 22) the justness of any legal judgement depends on the capability of the law to give answers to the unique and singular demands of the person who comes to the law. Against this claim Drucilla Cornell supports a radical incompatibility between law and justice: “It is only when we accept the uncrossable divide between law and justice that deconstruction both exposes and protects in the very deconstruction of the identification of law as justice that we can apprehend the full practical significance of Derrida’s statement that ‘deconstruction is justice’” (1992, 157).

In a way, both Cornell and Douzinas seem to be simultaneously right and wrong in their claims about the possibility of justice. A paradoxical situation only made possible by their attempt to theorise the limits of legal theory *from within* legal theory –instead of considering justice as a constituent limit of the law, and the law as a constituent limit of justice. But, what is the meaning of all this?

The key to understanding the paragraph above lies in the systematic character of the law. Namely, that a system unavoidably requires being limited in order to exist. Nevertheless, getting a proper grasp of the importance of such constituent limits, and thus explaining what was stated in the previous paragraph, it becomes absolutely necessary to make a stop here and introduce Niklas Luhmann’s systems

theory.<sup>8</sup> According to this German sociologist, every system is defined by the boundary –or, as we have called it here, “limit”– that differentiates such system from an infinitely complex environment, turning it into a zone of “reduced complexity” within the latter. However, the system does not appear fully isolated from its environment insofar as it also tends to select a minimum of information from the outside –information that becomes “meaningful” in the very process of being selected as relevant for the system– in order to ensure the good functioning of its inner communications. Such pieces of external information selected as meaningful are essential for the survival of the system itself –and, as such, they must be chosen very carefully– but if too many of them were selected, the inner complexity of the system would approximate that of its environment and thus the system as such would eventually cease to exist and dissolve back into the environment it emerged from at first (Luhmann, [1984] 1995). Therefore, following Luhmann, we could arguably say that if a system is to survive, its relations with the environment must be kept at a low level of complexity. That is to say that no system can fully encompass all the information surrounding it; or, in more Derridean terms, that there is no system capable of catching up with itself, hence needing a constitutive outside in order to exist (Cornell, 1992, 165). Therefore, according to Luhmann and Derrida, the possibility of attaining full presence in the law is but a myth: as a system, it requires being *limited* in order to exist.

So, what are its limits? Why do I say that Douzinas and Cornell are simultaneously right and wrong about what they say regarding justice? What makes such a paradoxical situation possible?

The limits constituting the law *qua* system are the already mentioned questions of contingency, subjectivity and justice; and there are at least two reasons for considering them as such. In the first place –and following the previous explanation on Luhmann’s systems theory– a thorough legal analysis of these phenomena or their full inclusion in the legal system would render the law inoperative and thus

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<sup>8</sup> The work of Ernesto Laclau on “empty signifiers” (2007) could be used for the sake of explaining this point –moreover since it opens a window of opportunity for the production of new “meanings” in terms of hegemony, making it more suitable for our analysis of justice. Nevertheless, I consider that Luhmann’s theories present the question of the limits in a simpler manner. So even if this research will turn later on to Laclau’s work, for the time being it seems reasonable to introduce this topic through the work of Niklas Luhmann.

useless. Inoperative and useless inasmuch as it is an expansive phenomenon supposed to be equally applicable to all the members of a given political community if such community is to exist as *comm[on]-unity*, and not as a mere multiplicity of personal identities (Althusser, [1970] 2001). The law must remain ultimately abstract in order to be generally applicable, because if it ever became so specific and detailed that it could foresee and rule the actions of any given subject –limit of subjectivity– in any possible situation –limit of contingency– and satisfy any imaginable demand –limit of justice– it would not be law anymore. In such a situation we would be left not with law but with a plethora of individual guides of behaviour so vast and extensive that no judge could ever hope to have full knowledge of them; and so complex and brief <sup>9</sup> that no legislator would ever have the capacity to give norms able to rule the behaviour of each and every citizen.

The questions of contingency, subjectivity and justice have thus to remain *partially excluded* and simplified –a limit– if law as a system is to survive. The choice of the most suitable abstract norm to be applied to a contingent situation is left for the judge to decide. The extant differences between particular subjects are nullified through their labelling as abstract “citizens” or “individuals,” depriving them of their faces, their own names and whatever other features could ever make them different from their fellows: they are reduced to a unified and homogeneous Other that ultimately constitutes the system law as such. And last but not least, the satisfaction that legal norms can provide to particular demands for justice does not depend on the final satisfaction of the demanding subject, but on the procedural rules that determine what actions can be used to enforce the law.

The full inclusion of these questions in the law would lead to its disappearance as a system. But if that is the case, why does it not simply exclude them in toto?

This takes us to the second reason why these phenomena are taken as constituent limits. Namely, that even if they represent a limit that refuses to be fully comprehended in the law, the latter still needs contingency, subjectivity and demands for justice in order to come (back) into existence. On the one hand, the law needs of the disjuncture between abstract norms and contingent situations, subjects and demands in order to *come into existence*. This means that, in an abstract

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<sup>9</sup> Brief due to the “short life” of the citizens for which these regulations would be made.

world where abstract legal norms could be easily applied with no need to adapt them to specific cases –for there would be no contingency, specific subjectivity nor personal demands for justice– the law would become purely descriptive, losing its normative character. It would be impossible to enforce for there would be no need to enforce it; and, therefore, it could no longer be considered as law (Derrida, 1990). On the other hand, the law also needs this disjuncture in order to *come back into existence*: as authors such as Benjamin, Foucault and Derrida show us, legal norms need to be periodically enforced in order to survive –that is, in order to *remain in force*. Law demands to be obeyed and disobeyed at the same time: it demands to be obeyed in order to assert its authority, but it also demands to be disobeyed in order to actualise its authority (Borsch-Jacobsen and Collins, 1985).

Law as a system cannot ignore contingency, subjectivity and demands for justice altogether; nor can it fully comprehend them within itself. These phenomena must remain out of it as a limit: simplified and partially ignored in order to ensure the good functioning of the inner communications of the system (Luhmann, [1984] 1995). In other words, they must remain as *constituent limits* of the law.

Nevertheless, and following Laclau and Hegel, we could arguably say that to think of the limits of something also implies thinking about what lies beyond such limits. If the law depends on contingency, subjectivity, and the articulation of demands for justice in order to come (back) into existence, but at the same time is unable to fully comprehend them, this means that in the end it is impossible to think about the law without thinking about its limits...and thus it is impossible to think about the law without thinking about what lies beyond these limits. And yet, the actualisation of that which lies beyond them would also “involve the impossibility of what is this side of the limit. True limits are always antagonistic” (Laclau, 2007, 37).

But what is the departure point for these reflections? When do we start thinking about these limits and what lies beyond them? What triggers the emergence of debates about justice within a legal framework? As stated above, the law needs the disjuncture between abstract norms and contingent situations, subjects and demands in order to come (back) into existence. And it is precisely in this chasm between the pre-existing legal norm and the contingent situation requiring its enforcement that

new debates about justice may appear. It is in this abyss, in this *différance*, between the legal representation of justice and the actual requirements of justice that the articulation of new demands for justice becomes possible. And thus, it is when these demands are made that we start thinking about and discussing the limits of the law and what lies beyond them. It is only when a contingent subject claims justice that the concept of justice as such irrupts into the politico-legal debate. But who is this contingent subject?

Legal theory tends to consider subjectivity, contingency and justice as mere problems to be solved by, within, and for the sake of the law. Undoubtedly, this is intrinsically related to their partial exclusion and their role as constituent limits both of law and legal theory; but it also explains why legal theory tends to focus on the figures of the legislator and the judge rather than on those of the victim or the offender. Since these questions are usually seen as problems for the good functioning of the law, legal theory has focused on finding the best ways of getting rid of these disturbing elements with no further concern about their origin, nature, effects or *raison d'être*. And therefore, historically, it has focused on those figures who can exert power over the design of the legal framework in order to minimise the effects of these phenomena: the legislator and the judge. It has focused on the neutralisation of these matters. That is to say, it has attempted to *remove the symptom* straight away without understanding the origins and inner mechanisms of this disturbance of the legal order. But why should questions such as subjectivity, contingency and justice be considered as symptomatic in this context? And if they happen to be symptomatic... symptomatic of 'what'?

A symptom is, according to Freud ([1917] 1991), "a sign of, and a substitute for, an instinctual satisfaction which has remained in abeyance; it is a consequence of the process of repression." This definition provides a relevant insight about the concept of "symptom" but it does not answer the previous question: What is being substituted? What is being repressed? A first answer to these questions would be "revenge," in the broadest sense of the word. What appears to be repressed would be the very possibility of taking justice into our own hands:

Human life in common only becomes possible when it comes to gather a majority. A majority more powerful than each of the individuals, able to remain united against any of these. The power of such a community faces as "Law" the power of the individual, which

is stigmatised as “brute force” [...]. The legal order, once established, shall not be violated in favour of an individual, being considered any violation of this kind as a pronouncement against the ethical value of such Law (Freud, [1930] 1963).

Ultimately, the three phenomena studied here are symptomatic of the repression of the ‘power of the individual’, now stigmatised as ‘brute force’ in contrast with the law. They embody the return of the repressed: the return of that which had been ruled out by the law. The appearance of questions of subjectivity, contingency and justice within and against a legal framework puts into question the pretensions of universal applicability, validity and legitimacy of the legal norm: they appear as a sign of, and a substitute for, a non-mediated relation among human beings. That is to say, that which is culturally labelled as ‘revenge’ or ‘brute force.’

The slave revolt in morality begins when resentment itself becomes creative and gives birth to values: the resentment of natures that are denied the true reaction, that of deeds, and compensate themselves with an imaginary revenge (Nietzsche, [1887] 1994).

It is the very figure of the ‘victim’ –that which is denied ‘the true reaction, that of deeds’– the one that embodies the failure of the law and its pretensions. And thus, it is the figure that allows us to start thinking about the limits of the law and legal theory –and, in turn, about what lies beyond these limits. Therefore, the approach taken in this research is entirely different from that of classical legal theory. Instead of erasing the symptom, it intends to provide a deeper understanding of it; instead of focusing on the solutions for a problem to be solved, it intends to focus on the origins and potentialities of the “problem” itself; instead of assessing these elements as that which disturbs a purported normal functioning of the law, it intends to argue that these very elements are what allow the functioning of the law in the first place; and instead of addressing the figures of the legislator and the judge, it will address those of the victim and the offender. In other words, this research aims to focus on the contingent subjects that bring about claims and debates about justice within a legal framework: victims and offenders.

Both embody the disturbing but necessary character of these phenomena within the legal framework. And thus, instead of focusing on ‘how to erase the symptom,’ this thesis aims to provide a deeper understanding of it, its origins, and its potentialities. In a rather Foucauldian fashion, and rather than focusing its attention



on a purportedly normal functioning of the law, this thesis will revolve around the particular struggles that reveal its structurally abnormal functioning. That is, its symptom.

A preliminary definition of victim can be found in the 1985 United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power:

‘Victims’ means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power...A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familiar relationship between the perpetrator and the victim. The term ‘victim’ also includes, where appropriate, the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization (Annex A.1 and 2).

It is important not to forget, however, that “offenders and victims are both victims” (Elias, 1986) since offenders –to a certain extent– are also victims inasmuch as they are usually denied the possibility of establishing a non-mediated relation with the victim in order to solve their conflict. They are victims as well, but their victimisation begins with their disempowerment by the state.<sup>10</sup> One may wonder then about the reasons underpinning the disempowerment of both parties in conflict. That is to say, one may wonder about the interests behind the mediation of the law in these particular struggles and its common “support” to the victims. An explanation can be found in the work of Walter Benjamin ([1921] 1996) and Jacques Derrida (1990). According to them, crime does not only cause pain and suffering to its victims, but also poses a threat to the authority of the law and the state monopoly on violence: the law needs to be enforced periodically in order to come (back) into existence and remain in-force. Therefore legal norms do not just regulate these conflictual relations, but they also need them in order to preserve their validity and normativity. There is a political interest in creating a social reality

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<sup>10</sup> A different case would be that of the state itself acting as a perpetrator or supporting them. A good example of this is the case of the death squads known as “GAL” –*Grupos Antiterroristas de Liberación* [Antiterrorist Liberation Groups] – established by the Spanish Government to fight the terrorist group ETA during the 1980s.

of victimisation that equals any attack on the victims to an attack on society as a whole. Such mediation fulfils an ideological function by means of which the law is depicted as a necessary good. And, by doing so, the state manages to posit itself – and hence society – as another victim of crime, identifying the interests of the victims with the interests of the state.

Well, my dear, you know the law is necessary, and what's necessary and indispensable is good, and everything that's good is nice. And it really is very nice indeed to be a good, law-abiding citizen and do one's duty and have a clear conscience (Ionesco, [1953] 1958)

However, this comes at a price: a degree of psychological damage and resentment on the part of the victims –which will be explained in further detail along the following section– appearing as a result of and in response to the shortcomings of the system. A sense of disappointment with the functioning of the law that, according to Jeffrey Reiman (as cited in Elias, 1986, 133) “is only in the eyes of the victim; for those in control, it's a roaring success!” And it is this very perception of failure that may help us understand why certain authors talk about a crisis in contemporary liberal theories of justice. The simplification and partial exclusion of these extra-legal elements –symptomatic of the repression of the ‘power of the individual’ and its stigmatisation under the label of ‘brute force’– produces an increasing sense of disillusionment due, among other things, to the common narrow identification of justice with ‘procedural justice’ or ‘legal justice’ (Hunt, 1993, 108). And it is precisely in the context of such miss-identification between justice and legal justice that this thesis seeks to provide a new theoretical framework that may allow us to get a better grasp of this ‘disillusionment’ with the law –of this ‘uneasiness in culture,’ if we make a more accurate translation of Freud's *Civilization and Its Discontents* (‘Das Unbehagen in der Kultur’ in the original German edition).

But how can we do such a thing? How can we explain this allegedly widespread sentiment of disappointment and uneasiness in matters of law and justice?

As it was explained above, there is not such a thing as an all-encompassing system: certain elements must always be left out of it. It must discriminate if the inner communications among its elements are to be preserved and functional. Therefore, it is not my intention to present here an all-inclusive view of law,

subjectivity, contingency and justice. No one can look right and left, nor “serve two masters” at the same time (Matthew, 6:24). Hence instead of trying to develop such an impossible project, the first two sections of the following chapter will focus their attention on the relationship between subjectivity and contingency –keeping the law as that unfathomable limit that closes the system and provides it with meaning while remaining ungraspable from within it. Building on this, the last section of the chapter will address the relationship that both justice and the law –as reciprocal constituent limits– seem to have with subjectivity and contingency. In a way, what this chapter seeks to do is to stand “back to back” with CLS, sharing its emancipatory goals and some of its insights, but looking in the opposite direction: towards the interconnection between subjectivity, contingency and justice.

CLS is, by far, the branch of legal theory that stands closest to the approach of this research. And although many of its ideas and projects are not just shared, but also embraced, there is still an aspect of it that remains open to criticism. This chapter began recalling Justinian the Great and his claim about Law’s ultimate end being no other than the human person for whose sake it is made, and certainly, CLS seems to recover that long lost approach and aims to place the living breathing subject at the very centre of all institutions and social constructions: as their highest cause and as their highest end. CLS intends to subvert a historically deep-rooted bias that posits this living breathing subject as a problem to be solved, as a factor to be taken into account for the good functioning of any economic or political system, and as a means towards an end. Nevertheless, this research seeks to complement an aspect of CLS that does not fit in with this subversive goal. Namely, that even if the empowerment of a living breathing subject appears as its goal, its theorisations repeat the top-down approach of other schools of legal theory that place this subject in a prominently passive situation. CLS repeats this scheme and may sin, although unwittingly, by paternalism and by relegating the subject to a certain degree of infantilism.

### **Conclusion: the common blind-spot**

This chapter has aimed to describe four schools of thought within legal theory putting them in relation to one another, highlighting the strengths and weaknesses of each of them from their own point of view and the others'. The order in which they have been presented is not casual or accidental. It was my intention to show how the premises of each of them are largely based upon the flaws presented by the previous ones, and how over time legal theory has been slowly moving in the direction of one of the main points of this project: the place of the subject in legal theory, the importance of his or her understandings of the relation between law and justice, and how these perceptions are affected by institutions such as the state monopoly on violence.

Natural Law –along with its emphasis on the moral content and the importance of the ends of the law– provided a metaphysical framework that, while being capable of justifying radical political theories and projects –e.g. the American Revolution– could also promote institutional and political stagnation by means of what seems to be a rather ideological use of constructions such as “God” or “morals.” Such views were harshly criticised by Legal Positivism and its emphasis on the validity and the form of the law. By trying to enclose law in itself, Legal Positivism tried to fully secularise legal theory and get rid of the ambiguity of a previous set of beliefs, capable of justifying actions that could go against the rule of law and the stability of the whole system. In this sense, Legal Positivism could be understood as the legal mirror of modernity and the project of the enlightenment. It was criticised in turn by Legal Realism, which gave greater importance to the factual character of the law: its efficacy and application. The Nietzschean turn in Legal Realism gave the already damaged connection between the law and the metaphysical assumptions inherited from Natural Law –through Legal Positivism and its formal imperative– its *coup de grâce*. And, finally, Critical Legal Studies gazed at these theories and analysed their ideological implications in the reproduction of the existing relations of power and domination.

All these theories have their own flaws in relation to one another; however, all of them seem to present a common flaw or blind spot to a greater or lesser extent: they ignore the place of the subject in legal theory, the importance of his

understanding of the relation between law and justice, and how these perceptions are affected by institutions such as the state monopoly on violence. Surely they are not completely blind to the human factor in the law, but they largely adopt a paternalist stand in which the living breathing subject remains as a problem to be solved, as a factor to be taken into account, or as a mere recipient of the law. And although CLS does it to a lesser extent, the scholars ascribed to this current also relegate the subject to a passive position in which the latter is told what to do, how, or in what form, regardless his views on the law and justice.

Therefore this research aims to cover, over the following pages, that common blind spot by combining the use of psychoanalytic theory and different works in continental philosophy: adopting a psychosocial approach in order to deepen these subjective understandings of law and justice. Admittedly, the research must remain incapable of analysing certain aspects of Law that can only be studied from the point of view of legal theory, for “the possibility that psychoanalysis can ever interpret the Law is excluded. It is excluded by *right*, since the law provides the conditions of possibility of psychoanalytic interpretation” (Borsch-Jacobsen and Collins, 1985).

## CHAPTER TWO

### Thinking from-beyond the Limits of the Law

Next him high arbiter  
Chance governs all.

(John Milton, *Paradise Lost*)

I am a subject  
And I challenge law: attorneys are denied me;  
And therefore personally I lay my claim  
To my inheritance of free descent.

(William Shakespeare, *Richard II*)

The previous chapter invited us to remember Emperor Justinian's views on the law and how, in his opinion, its ultimate cause appears to be no other than the human person for whose sake it is made. In light of that idea, four different schools of thought were analysed and criticised, highlighting how all of them seem to present a series of common blind-spots: the place of the subject in legal theory, the importance of his or her understandings of the relation between the law and justice, and how these perceptions are affected by institutions such as the state monopoly on violence.

It is very important to keep in mind this idea of "the human person for whose sake the law is made" if the goal of this research is to be suitably understood. Natural Law, Legal Positivism, Legal Realism and Critical Legal Studies (CLS) have focused so far on the relationship between the law and the figures of the judge or the legislator. And yet, none of them have approached legal theory or law itself from the point of view of the subject: "Nothing that passes as legal theory has ever,

to the best of my knowledge, adopted a victim or defendant perspective” (Fitzpatrick and Hunt, 1987, 10). Therefore, the common blind spot and limit of these four legal theories –even in the case of CLS– is no other than the question of subjectivity and its radical contingency in relation to the law, and how this affects, in turn, our understandings of both law and justice.

That is, precisely, the departing point of this chapter: the subject before the law and the law before the subject. This chapter aims to lay the ground for a new theorisation of justice upon that blind spot. Using psychoanalytic theory and the work of philosophers such as Louis Althusser, Walter Benjamin and Jacques Derrida, it will try to present law from its limits and for its limits –subjectivity, contingency and justice. Thus one could arguably say that this chapter will explore the reciprocal relationship between law, justice and “[t]he man of flesh and bone; the man who is born, suffers and dies –above all, who dies; the man who eats and drinks and plays and sleeps and thinks and wills; the man who is seen and heard; the brother, the real brother” (Unamuno, [1913] 1972).

Here I will focus on the questions of subjectivity and contingency and the way in which they seem to reveal three interlocked dimensions of analysis in the study of justice: contingency, desire, and temporality. Dimensions that will be studied in further detail throughout the second half of this thesis, devoting one chapter to each of them. Nevertheless, this postponement of the study of justice is not accidental. It responds to the need to show, in the first place, how subjectivity and contingency – as constituent limits of the law– open a window of opportunity for debates on justice. For this reason, it is essential to elaborate an in-depth theorisation of subjectivity and contingency before this research can move on and address the topic of justice head on. On the one hand, the question of subjectivity requires further theorisation inasmuch as legal theory seems to reduce and nullify the extant differences between particular subjects, thwarting particular circumstances and characteristics that, ultimately, bring about and create the conditions of possibility for debates and claims about justice within a legal framework. And, on the other, contingency should also be studied in detail if we are to see how the chasm between any contingent case and the application of an abstract legal norm opens a space for the enforcement and re-enforcement of the law.

Making use of subjectivity and contingency as “constituent limits,” this research aims to introduce an original twist in our current understandings of law and justice in three different ways. In the first place, and unlike legal theory, it will try to adopt the perspective of the legal subject. In the second place, it will also try to go beyond the “faceless humanism” deployed by liberal political theories –such as those of Jürgen Habermas and John Rawls– in which the living breathing subject –the contingent finite subject with a name of his or her own– is reduced to a mere abstraction, nullifying every difference in an act of symbolic violence (Bourdieu, 1984) for the sake of rendering a theory universally valid. And last but not least, this study will not make a substantive analysis of the concept of justice trying to respond with a definition to the question “what is justice?” On the contrary, it will approach “justice” as a category of understanding rather than as a normative concept, allowing us to focus on different questions such as “how is it used?”, “how does it work?” or “how is it experienced?”

That being said, the questions that guide the development of this chapter are no other than “what is the role of the subject before the law?”, “what is the role of the law in the formation of the subject?”, and “what is the function of the idea of justice in this reciprocal relationship?”

Undoubtedly, giving a full answer to these three questions would require a whole dissertation of its own, but it is my intention to use this chapter as a route to provide an introduction to a series of concepts that will gain increasing relevance throughout this research. Consequently, the rest of the chapter is structured in the following way: The first section of this chapter will analyse the question of subjectivity in relation to the law; and the second one will address the question of contingency, also in its relation with the law. The last part of this chapter will be devoted to a preliminary analysis of the role of subjectivity and contingency as common constituent limits of law and justice; and how, in turn, justice and the law appear as constituent limits to one another.



## Subjectivity

### *Grounding the theory: the case of ETA and its victims*

Dealing with the question of subjectivity from a strictly theoretical point of view would be rather paradoxical insofar as it would entail making abstract something that is profoundly actual and contingent at its core; thus it seems necessary to introduce here a real case capable of anchoring this theoretical edifice to reality. A real case with the capacity to illustrate the analysis conducted here. Hence the first problem faced in this section is “what real case” to choose in order to do such a thing. As was explained in the Introduction, cases within criminal law may seem more suitable than others in this respect insofar as they are generally perceived as “less technical” and more “emotionally evocative.” It seems easier to have a subjective opinion regarding a case of homicide or rape than in one of trading in influence, or tax evasion. But if that is so, what case within criminal law? An assault? A case of domestic violence? A case of murder? A case of rape? Or maybe a case of kidnapping?

Surely there are countless options. But in this regard, and among many other possibilities, there is a particular case that may be of special interest to this research: the case of the terrorist group *Euskadi Ta Askatasuna* – “Basque Country and Freedom” – also known as ETA.<sup>11</sup> Beyond my initial curiosity about the reactions of some of its victims, there are several reasons for the usefulness of this case in the present analysis of the question of subjectivity. One of them was already mentioned in the previous paragraph, and it is that, just like other cases of criminal law, terrorist attacks constitute a highly controversial and socially sensitive issue. Another one is that in a long-standing conflict –such as this– the effects of the law, and questions of justice and contingency on matters of subjectivity and identity-formation become visible than in shorter processes. And last but not least, the political character of terrorist attacks highlights, in turn, the political character of the law<sup>12</sup> due to its tendency to react particularly swiftly and harshly in cases of political violence –

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<sup>11</sup> The case of ETA and its victims will be studied in more detail over the following chapters.

<sup>12</sup>As stated above, the political character of Law is one of the main theses defended by legal scholars ascribed to Critical Legal Studies.

which also helps us see more clearly the chasm between the true ends and actual functioning of the law, and the interests of the subjects which it is meant to protect.

Since its creation in 1958 ETA has killed 829 people –with all that implies: decades of victims, arrests, trials, penalties, legal reforms, political interventions, news... However, this chapter will focus its attention on the last years of ETA (2006 – 2013) and what has been called “the Parot Doctrine”. Hence let’s take a step back in time. January and February 2006 were months of intense demonstrations and protests in Spain, in front of penitentiary institutions and courts of justice. The reason? About twenty ETA terrorists were about to be released from prison that year. What caused such a juridical and political commotion was that despite some of them being sentenced to nearly 4,000 years of imprisonment in the 1980s, they were about to be released after 20 years. The numbers were shocking: how could it be possible to reduce a prison sentence of millennia to 20 years?

In the 1980s –when these terrorists were arrested, judged and sentenced– the Criminal Code Act of 1973 was in force, and this law provided a maximum time of imprisonment of 30 years as long as the crimes committed were interrelated. In addition, all prisoners could reduce their sentences: two days’ work for one day’s reduction. Whether one agrees with the provisions of this law or not, there is a clear legal explanation for the release of these terrorists: since all their crimes were deemed as terrorist actions they appeared interrelated and thus the maximum penalty that they could face was, de facto, 30 years. And since it was possible to reduce their sentence by one day for each two days worked, their time in prison could be effectively reduced by one third: hence they could actually be released after 20 years in prison.

Such was the maximum penalty that Spanish criminal law could provide at that moment. However, having the front pages of some of the most relevant newspapers full of news about terrorists being released “too soon” rapidly triggered social outrage and soon different Governments started to realise that the commitment of the law with social reinsertion might be a little “excessive” for their taste –that is, if they were to remain in office– so they reformed the Criminal Code Act, first in 1995 and then 2003, in order to make sentences tougher for certain crimes – including terrorist attacks. The 1995 reform put an end to the possibility of reducing

sentences by means of prison work, and the 2003 reform raised the maximum time in prison for these crimes from 30 to 40 years while also establishing that any prison benefit had to be applied to the full extent of the penalty instead of the maximum time of imprisonment. After these reforms the victims and Spanish public opinion were pretty much satisfied and convinced that, from now on, terrorists would serve their entire sentences. Nevertheless, everyone seemed to forget about the Spanish Constitution (SC), whose article 9 states as follows:

The Constitution guarantees the principle of legality, the hierarchy of legal provisions, the publicity of legal enactments, *the non-retroactivity of punitive measures that are unfavourable to or restrict individual rights*, the certainty that the rule of law will prevail, the accountability of the public authorities, and the prohibition against arbitrary action on the part of the latter.<sup>13</sup>

Therefore in 2006, just three years after the 2003 reform, there was a generalised outcry on the part of the victims of ETA when they learned about some twenty terrorists who were about to be released after 20 years in prison: What had just happened? Did not the Government say that from now on terrorists would serve their entire sentences? What happened with terrorists being imprisoned for 40 years? What was wrong with the legal system? What happened to justice?

As stated above, after the reform of the Criminal Code in 2003 everyone seemed to forget about article 9 of the Spanish Constitution, which prohibits any retroactive application of punitive measures that could be unfavourable to or restrict individual rights. Despite the reforms of 1995 and 2003 the terrorists that were about to be released were judged and sentenced according to the Criminal Code Act 1973 and thus these reforms could not affect their sentences since the changes that had been introduced were more restrictive and unfavourable to individual rights than the original regulations. Doing otherwise would go against the Constitution –and also against article 7 of the European Convention on Human Rights (ECHR). So why did (almost) everyone believe that these terrorists should remain imprisoned if

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<sup>13</sup> Original text: “La Constitución garantiza el principio de legalidad, la jerarquía normativa, la publicidad de las normas, la irretroactividad de las disposiciones sancionadoras no favorables o restrictivas de derechos individuales, la seguridad jurídica, la responsabilidad y la interdicción de la arbitrariedad de los poderes públicos.”

according to the law –and more importantly, according to the “rule of law” – they had to be freed? Why did people talk about “injustice” if the state had provided them with all the justice they could hope for according to Law?

There are several possible answers to these questions. One could arguably say that the Government that passed the reform in 2003 had an electoral interest in making people believe that they were about to vanquish ETA and that the victims –politically enshrined to the status of civic martyrs or even living saints– never again would have to see ex-convicts of ETA in their neighbourhoods and towns. Another answer could rely on the idea of fantasy as an escape in order to explain why people unconsciously preferred to ignore the existence of that article in the SC. Perhaps it was a severe case of legal ignorance. It would also be possible to answer that Spanish politicians simply did not see this coming. There are many possible explanations and most of them are, to say the least, partially valid. All these answers raise, in turn, a set of questions –such as why the victims had been publicly enshrined to that position– that demand answers themselves.

The Supreme Court, the Constitutional Court and the Government were subjected to enormous social pressure. A social pressure so intense that the Association of Victims of Terrorism (AVT) even accused the Spanish Government of “betraying the dead” and being “pro-ETA”. Finally, all this had consequences and the legal-political apparatus of the state bowed to the outcry of the victims – turned de facto into a lobby. In order to avoid further conflicts the Supreme Court decided to introduce a radical change in its jurisprudence and established the so-called “Parot Doctrine”. This new jurisprudence read the Criminal Code Act of 1973 in the light of its reforms in 1995 and 2003, promulgating that the sentences against crimes committed before the reform that took place in 1995 could actually be reduced by means of work or study...*but* these reductions would apply to the absolute total term of the sentence instead of the maximum sentence of 30 years. Hence the convicts would remain imprisoned up to 30 years unless they achieved the virtually impossible goal of reducing a sentence of more than 4,000 years to less than 30.

The state, the victims and the media depicted this change as a victory over terrorism. It seemed like a win-win solution: newspapers sold countless copies, the

victims proclaimed that justice had been done, and the state pictured itself as the epitome of democracy as it could listen to and satisfy the demands of its people. Imprisoned ETA terrorists thought differently: Inés del Río Prada, sentenced in 1987, was one of the members of ETA that had to be released between 2006 and 2008 –as was Henri Parot, the prisoner after whom the new jurisprudence was named. In application of the Parot Doctrine she had to remain imprisoned until 2017 –instead of 2008– and thus she appealed to the Constitutional Court arguing that the rule of law had been flouted since article 9 of the Spanish Constitution and articles 5 and 7 of the ECHR prohibit any retroactivity of this kind, as was previously stated. The Constitutional Court –whose members are chosen *de facto* by the two great parties and thus is highly politicised– declined del Río’s appeal and supported the new jurisprudence. Facing this situation, del Río decided to take her case to a higher instance and appealed to the European Court of Human Rights using the same arguments: in 2012 the Court ruled that she was right, and although the Spanish Government appealed the new sentence –which rendered the Parot Doctrine invalid– the European Court ratified it in October 2013. Spain was compelled to release her immediately along with dozens of other convicts also affected by the late doctrine, being forced to pay them tens of thousands of euros in compensation.

“History repeats itself”, as Marx would say. But in 2006 and 2013 history was repeating itself first as farce, and then as tragedy. First as farce since in 2006 Spain violated its own rule of law in order to satisfy the demands of the victims and reinforce its own power –power beyond the law– against ETA. Something that was inevitable –the release of the terrorists– had been socially repressed, and seven years later the “tragedy” occurred when it reappeared with renewed and increased strength: Spain had violated its own laws. Moreover, Spain had violated the human rights of a group of convicts that had been politically dehumanised and transformed into enemies and the incarnation of evil for decades. The enshrined victims were told that they –“the good ones” – were doing something wrong by demanding longer imprisonments for the terrorists –“the evil ones.” From their point of view the resolution of the European Court went beyond injustice: it was an insult. The last months of 2013 witnessed statements and demonstrations of the victims against the new sentence –going as far as demanding the Spanish Government to disobey

and leave both the EU and the ECHR. However, had changed since 2006. On the one hand, ETA declared a permanent ceasefire and cessation of armed activity verifiable by international observers in October 2011; on the other, the conservative “People’s Party” (PP) –which between 2004 and 2011 had backed and supported the demands and protests of the AVT against José Luis Rodríguez Zapatero’s Socialist Government– won the elections in November 2011. These events profoundly affected and altered the social perception of the new sentence with respect to what happened in 2006: First, in view of the inevitable and forthcoming end of ETA, greater segments of society harboured hopes of permanent peace and seemed less concerned about the release of a bunch of convicts who would have to be released in any case in three or four years; thus the social resonance of the demands of the victims –which started to be perceived as putting “justice”, perhaps even vengeance, before an end to violence– decreased substantially. And second, the party that used to be their greatest support in the past won the elections by an absolute majority. Mariano Rajoy’s new Government had to abide and comply with the sentence of the European Court in Strasbourg –surely leaving the EU and the ECHR due to the demands of an increasingly less popular lobby, whose expiry date had been established by ETA’s forthcoming disappearance was not an option– and could afford to “ignore” their demands for some time until the next general elections in December 2015.

Since October 2013 various groups of victims –especially the AVT– and several politicians subscribed or (now) previously subscribed to the PP have shown their uneasiness and disagreement with the current situation. Their reactions have ranged from the denial of the defeat of ETA –a position defended by Jaime Mayor Oreja, former Prime Minister Aznar and some other senior PP leaders– to the creation of a new right-wing party called “Vox” by members of the PP that no longer approve the policy of the Rajoy Government, or the demonstrations held by the AVT in Basque towns and villages where ETA ex-convicts have returned or are expected to return. However, all these responses have something in common: they all demand justice for the victims.

Where does it all come from? What prompts them to deny the defeat of ETA and even accuse the Government of treason? What makes them suggest via Twitter that Amnesty International is pro-ETA? Why are they proposing now to do away

with the Supreme Court? Why would a victim such as José Antonio Ortega Lara – who was abducted for almost two years– accuse Spanish politicians of ‘prostituting the Constitution’? What makes them say that ETA has won and defeated democracy and the rule of law?

In the light of the above explanation regarding the Parot Doctrine these reactions seem utterly disproportionate and senseless: ETA had not been able to kill since March 2010 –when they murdered a French Gendarme during a chase near Paris– and over the last few years its leaders would not last more than few months until being arrested; the Supreme Court and the Government had gone as far as to go against the Constitution and rule of law in order to satisfy the demands of the victims until the European Court finally ruled otherwise and restored the rule of law enforcing article 9 of the Spanish Constitution. So several questions must be asked: What leads to such a “misinterpretation” of reality? Why did the victims change their position and start seeing the rule of law as a source of injustice instead of a means of ensuring justice? Why do they deem this situation as unjust when these terrorists have been sentenced to the maximum penalty allowed in Spanish law? Why do they consider this situation as unjust when they have been provided with the “maximum justice” that Spanish law could offer at that moment? Why do they feel betrayed then?

All these questions could be easily answered by saying that it has been the change introduced by the European Court what has provoked this situation. However, such an explanation appears ultimately shallow and flawed. Surely the resolution of the European Court triggered these reactions, but nothing else. If the causes behind this behaviour are to be found it is essential to deepen into a particular understanding of the relationship between Law and justice. It is to say, it is necessary to investigate the matters of subjectivity that lead to this misinterpretation of the role of the law and its relation with justice.

Undoubtedly similar behaviours can be observed in other cases –abduction, murder or rape– echoed by mass media, but as it was noted above, the long duration of the case of ETA presents an advantage: it shows the effects of both the law and justice on subjectivity and identity-formation dynamics more clearly.

From now on, and in light of this example, I will address the question of subjectivity in relation to the law. And, more particularly, the unbridgeable gap between the legal need to turn subjects into abstract faceless entities equally susceptible of trial and legal judgement regardless of their differences –regardless of that which makes them who they are– and the radical subjective impossibility of experiencing the law as non-subjective abstract citizens. Once more, quoting Unamuno ([1913] 1972) we could say that the main concern of this section is the relation between “[t]he man of flesh and bone; the man who is born, suffers and dies –above all, who dies; the man who eats and drinks and plays and sleeps and thinks and wills; the man who is seen and heard; the brother, the real brother” and the law: the construction of the legal identity of this subject, and his views on the relation between the law and justice.

This very research is, in its own way, ‘out of joint’ in as much as it requires to maintain an almost impossible but necessary and delicate balance between radical subjectivity and abstraction. It is true that a purely abstract approach would jeopardise this attempt to emphasise the question of subjectivity. But it is equally true that even if one endorses Unamuno’s understandings of subjectivity, being mainly concerned about this ‘subject with a name of his or her own’, a minimum level of abstraction is needed whenever a new theoretical framework is to be posited. In the very moment that these concrete subjects are grouped under the term “subjects” we are already betraying their actual existence, we are already betraying what and who they are. Ultimately, we cannot give them full presence in any theory:

Perhaps even more than constituted authority, it is social uniformity and sameness that harass the individual most. His very "uniqueness," "separateness" and "differentiation" make him an alien, not only in his native place, but even in his own home. Often more so than the foreign born who generally falls in with the established (Goldman, 1940).

However, this structural limitation to the possibility of offering a theory of subjectivity offers no excuse not to try to address this question, and thus I intend to keep a balance between both tendencies and bring this analysis as close as possible to the “uniqueness” of the subject.



### *Law and the production of subjectivity*

Claiming that a phenomenon such as the formation of the subject is restricted to the latter's interactions with the law and its subsequent effects would be a tremendously dangerous simplification or reductionism. Language, ideology, morals, ethics, religion and other cultural codes and practices also take part in this process. However, all of them have something in common: they belong to the Lacanian register of the Symbolic: and so does the law. Ultimately these phenomena constitute part of the social universe into which, following Heidegger ([1927] 2010), individual human beings are thrown at birth. The place of the law in subject formation processes can thus be understood in terms of its symbolic and ideological dimension (Hunt, 1993, 91). As stated previously, one of the most remarkable features of the law is its normativity: its capacity to prescribe and forbid certain behaviours. This implies that if citizens followed legal norms in every case and every situation, law itself would become purely descriptive and thus all laws along with their enforcing mechanisms would be rendered ultimately useless: the law would not meet its regulatory function. In order to preserve such a function it must be normative and demand obedience –although also disobedience<sup>14</sup>– to its rules and norms in the same way that speaking a language requires the use of a specific set of words and grammatical rules, or in the same way that professing a religion demands faith in a specific deity and the observance of certain rites. All social phenomena belonging to the register of the Symbolic impose norms on the subject, and by doing so they also constitute it as such: they are based on and reproduce relations of power and dependence which are the departing point for any subject formation process, as Judith Butler points out in *The Psychic Life of Power* (1997). Several questions could be raised at this point, but arguably the most pressing ones are “Why is the law to be understood in terms of its ideological dimension instead of, let's say, a religious or moral dimension?” and “How does the symbolic-ideological dimension of the law actually produce subjectivities?”

It is possible to find a response to the first question in the works of Louis Althusser and Sigmund Freud. The former sustained that “[i]deology represents the imaginary relationship of individuals to their real conditions of existence” and also

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<sup>14</sup> This demand of disobedience is made in order to actualise its authority (Borsch-Jacobsen and Collins, 1985).

that it has “a material existence” ([1970] 2001). And the latter, in *Civilization and Its Discontents*, argues that “the term culture describes the sum of productions and institutions that separate our life from that of our animal ancestors and serve two purposes: protect men against Nature and regulate the relations among them” ([1930] 1963). In the 21<sup>st</sup> Century the “protection of men”<sup>15</sup> against nature can arguably be taken for granted,<sup>16</sup> and it would seem to have more of a technical character than otherwise. Hence of these two goals that culture is supposed to meet according to Freud, the second one seems to be, by far, the most relevant nowadays. And, following that reasoning, one could also say that, at the end of the day, the law appears as an outstanding element within this second dimension of culture insofar as its normative character entails prescription and/or prohibition of certain behaviours, hence regulating relations among human beings in their everyday life. To a certain extent it would even be possible to posit that law constitutes the very kernel of culture. However, this role of the law within culture reveals something else: inasmuch as it regulates and prescribes relations among human beings, it does not describe the actual relation among them. Here is where Freud and Althusser meet: the law establishes an imaginary relation among human beings instead of describing their actual relations. It prescribes an “imaginary” relationship in opposition to the actual conditions of existence of individual human beings: it creates a “false consciousness.”<sup>17</sup>

It is obvious that such explanation falls short and that the ideological dimension of the law might actually be way more complex than that. Nevertheless, it is important to remember that this analysis of the question of subjectivity in relation to law –as well as its connections with contingency and justice– has an introductory character, for all these questions will be explained in further detail throughout this thesis.<sup>18</sup>

Following on from the previous explanation, something similar could be predicated in relation to the second question –“How does the symbolic-ideological

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<sup>15</sup> This sort of sexist language is common in the work of many pre-World War II authors, such as Freud or Unamuno.

<sup>16</sup> Except for large-scale natural disasters such as earthquakes or hurricanes. The case of environmental law is unique insofar as its most immediate goal is not to protect us from our nature, but to protect nature from us.

<sup>17</sup> Arguably, in Lacanian terms, Law prescribes an imaginary relation to the Symbolic.

<sup>18</sup> Particularly in Chapter Four.

dimension of the law actually produce subjectivities?” The extensive body of literature on the topic reveals almost immediately that the description of the process of subject formation cannot be reduced to a paragraph if it is to be academically rigorous. Nevertheless, it becomes pressing at this point to provide a preliminary explanation of this topic in order to unravel some basic theoretical assumptions of this research.

As in the case of our previous question, it is also possible to find an answer for this one in the theories developed by Freud and Althusser. If the law is ideological inasmuch as it is normative and creates “false consciousness” regarding human relations and society, there must also be a way by which it can become vested with the power and authority to regulate such relations. And, in this regard, Freud’s views on the origins of society –and the law– may be useful:

Human life in common only becomes possible when it comes to gather a majority. A majority more powerful than each of the individuals, able to remain united against any of these. The power of such a community faces as “Law” the power of the individual, which is stigmatised as “brute force” [...]. Thus the first cultural requirement is that of justice. It is to say, the certainty that the legal order, once established, shall not be violated in favour of an individual, being considered any violation of this kind as a pronouncement against the ethical value of such Law ([1930] 1963).

For his part, Althusser seems to refine and complete Freud’s statement when he argues that domination is inherent to society: without structures of domination there would be a complexity or aggregate of human beings, but not a society. The latter only comes into existence when its members stand as a unity ([1970] 2001). That is to say that both society and the law exist as such insofar as (1) they are imposed on individuals and (2) they provide these individuals with a sense of belonging or unity. In Nietzschean terms we may even say that they only begin to exist when a hundred men stand together, and each of them loses his mind and gets another one. The law becomes capable of producing subjectivities through its enforcement: through its imposition upon individual human beings. Such is the normative character of the law, which imposes itself upon individual human beings and in turn legitimates itself by doing so, as Derrida explains in *The Force of Law* (1990). The “majority more powerful than each of the individuals” prevents these individual human beings from giving way to their desires under the threat of force and

punishment. Most certainly these reasoning may require further explanation, but for the time being it would not be unreasonable to consider the enforcement of the law and the threat of legal punishment as the socio-political manifestation of the “reality principle” –Freud– that provokes a turning back of the individual upon itself – Nietzsche– constituting the individual as a (legal) subject within a given set of legal relations with other subjects under the same legal order.

*Turning back upon oneself: constituting victims as victims*

The answers provided so far may look rather abstract or even confusing. However, they become much clearer in the light of the case of ETA and, more specifically, its victims. Maybe ‘man’ is condemned to be free (Sartre, [1943] 2003), but truth be told, the only common condemnation to all human beings is that of death: we are condemned to die and disappear. No one escapes such a fate.

Death [i]s the ultimate constitutive outside shared by all of us mortal beings. It belies the myth of full presence. [And] the fear of death is the fear of object loss; it is the fear of being helpless before our own grief and of being powerless to bring the other back (Cornell, 1992, 55-56).

Those who are still here witness how those they love eventually fade away and die. Those who are still alive, those who remain, are in turn sentenced to loss and the suffering that it entails. As we live and interact with others they eventually become part of our lives, part of ourselves: as we internalise languages, mores and norms by entering the Symbolic we also internalise our relations with others, and by doing so they eventually become part of who we are and how we think of ourselves. Hence every loss we experience entails a partial death: a partial death of our-selves. A premature fading away that announces an inescapable tragic fate<sup>19</sup> which in turn discloses an utter helplessness and powerlessness that challenges our sense of control over our own lives. Loss entails suffering, but a suffering that transcends loss itself insofar as it also reveals our impotence and lack of control, making it even harder to accept. “There must be a reason for this suffering, this cannot be in vain” –we are prone to think. “If we are lacking control and power it is because it has been taken from us. It must have gone somewhere: it cannot simply

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<sup>19</sup> “Tragic” in a purely Nietzschean sense: “Tragedy sits in sublime rapture amidst this abundance of life, suffering and delight” ([1872] 2003).

disappear.” As Nietzsche well noticed, it seems more difficult to accept that such control never existed than that it may have been “taken away” or “stolen” by someone else, and thus we seek someone to blame in order to regain part of our lost control. Our wounded pride compels us to blame someone to regain part of a power that we never had, and thus we never lost.

For every sufferer instinctively seeks a cause for his suffering, more exactly, an agent; still more specifically, a guilty agent who is susceptible to suffering –in short, some living thing upon which he can, on some pretext or other, vent his affects, actually or in effigy...This...constitutes the actual physiological cause of resentment, vengeance, and the like: a desire to deaden pain by means of affects...to deaden, by means of a more violent emotion of any kind, a tormenting, secret pain that is becoming unendurable, and to drive it out of consciousness at least for the moment: for that one requires an affect as possible, and, in order to excite that, any pretext at all (Nietzsche, [1887] 1994).

So why do not victims try to take revenge against the terrorists they blame for their suffering? Would it not be healthier to avenge the death of their beloved ones and get rid of that unbearable pain?

That is where the law and the state monopoly on violence come in. The threat of legal punishment in addition to their current pain prevents victims from taking vengeance: they cannot give way in their desire without undergoing additional suffering. As Walter Benjamin notices in *A Critique of Violence* ([1921] 1996), the state cannot afford to leave personal vendettas unpunished. Not just because of the intrinsic damage of their actions –in cases of terrorism such as the ones considered in this thesis, a lot of people would arguably be more than understanding with a victim wanting to take revenge against the offender– but because of the *political damage* that they entail: the authority of the state relies chiefly on its *legitimate monopoly on violence*. If people start taking “justice” in their hands, the violence exercised by the state could no longer be considered to be a monopoly, nor legitimate.<sup>20</sup> Therefore, victims are encouraged, when not forced, to rely on the state to provide them with justice for their loss.

Undoubtedly, this has a deep impact on the way in which victims perceive themselves and their relations with other citizens, including terrorists. On the one

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<sup>20</sup> A good example of this is the constitution of “Self-Defence Groups” in Michoacán (Mexico) as a response to the inoperability of the police and the army against the Narco.

hand, the demands of the state and the rule of law –in addition to the loss caused by a terrorist attack– worsens the sense of powerlessness of the victims, making their wish to regain control even more pressing. On the other, and in the same way that the state takes stronger measures against political crimes –terrorism, treason, secession– than regular transgressions –robbery, theft, burglary, fraud, assault, aggression– it also has a special interest in promoting the figure of the victim. A promotion which has some other effects of its own. First, by highlighting their confidence in the rule of law and the actions of the state –which is far from being natural or spontaneous– despite their terrible situation, the state seeks to set an example, a model of behaviour, for all citizens. And second, by doing so it also enshrines the victims, turning them into living martyrs and saints that –besides being a model of civic virtue for all citizens– play a key role in the creation of a sense of conflict between “good” and “evil”: in one corner the good suffering victims and the institutions supporting them; and, in the other, the bloodthirsty terrorists who seek to destroy society.

At this point it becomes possible to draw some conclusions and make certain assumptions about the victims of ETA and the production of their subjectivity in relation to the law. First, the victims suffer from loss and disempowerment due to their lack of control over the situations –terrorist attacks– that put an end to life as they had known it. Second, this suffering is reinforced by further disempowerment due to the effects of state monopoly on violence and the rule of law –that is to say that due to the threat of legal punishment, they are encouraged to *sublimate* and shift their desire for vengeance to a more socially acceptable behaviour, such as demands for legal punishment. Third, the state *qua* political entity has an interest in enshrining victims for two different reasons: on the one hand, it is invested in their submission/confidence in the rule of law insofar as they may come to represent a model of behaviour for all citizens; on the other, and by promoting the righteousness of the victims in their claims, the state also manages to polarise its conflict with the terrorists in terms of “good” and “evil”. Fourth –and this is the ultimate consequence of the process described in the previous points of these

paragraph— the identification between concepts such as “damnificados,”<sup>21</sup> “victims”, “state”, “rule of law”, “democracy”, “righteousness”, “justice” and “good” under a same chain of empty signifiers (Laclau, 2007) simultaneously contributes to (1) the polarisation of a conflict which is reduced to sheer friend-or-foe dichotomy (Schmitt, [1922] 2005) and (2) the reinforcement of the will of the victim to seek “a cause for his suffering, [or] more exactly, an agent; [or] still more specifically, a guilty agent who is susceptible to suffering –in short, some living thing upon which he can, on some pretext or other, vent his affects, actually or in effigy” (Nietzsche, [1887] 1994). The ultimate consequence of this process is then the constitution of the *damnificado* into victim: the production of the victim as such.

### *Wounding attachments*<sup>22</sup>

Notwithstanding the role that mourning and melancholia may play in the production of the victim as a subject, it is important to highlight here that the ideological creation of these “imaginary” relations –in the words of Althusser– also entails the production of a specific kind of subjectivity –that of the victim as such– which in turn implies an identification with (1) a sense of legal/moral righteousness and (2) the endurance of loss and suffering. This socially-recognised sense of moral righteousness that becomes, however, a poisoned chalice for the victim insofar as it is based upon pain and sorrow. A poisoned chalice that produces a wounding attachment to suffering and prevents the victim from moving on whenever there may be a chance to do so.

This idea of “wounding attachments” (Brown, 1995) represents an invaluable theoretical tool in gaining a better understanding of the attitude of some of the victims of ETA towards the end of violence and the resolution of the European Court against the Parot Doctrine. This topic will be elaborated further on in the following chapters but, for the time being, it is possible to say that if the victims were to accept the defeat of ETA, their ongoing suffering –from which they never

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<sup>21</sup> This Spanish term is normally translated as “victim” but it literally means “damaged” or “hurt”, allowing us to see the difference between one who has been wronged by another citizen, and the legal constitution of this “damaged person” as victim of a crime.

<sup>22</sup> The idea of “wounding attachments” refers to Wendy Brown’s concept of *wounded attachments* (1995). The change in terminology from “wounded” to “wounding” is intentional and refers to the lasting and continuous effects of these attachments on the constitution of the subject.

recovered due to an attachment produced by the factors explained above— would eventually be rendered meaningless: “it would have been all for nothing.” Ultimately, they would be compelled to face what made their suffering unbearable in the first place: its inevitability, meaninglessness, and irrationality. And yet, this may not be possible for them insofar as their suffering has also become sharper, deeper, and even more difficult to accept than in the past due to the fact that, at this point, they have already been disempowered on three different occasions: first by ETA, then by the rule of law, and finally by the end of the conflict. The current scenario presses them towards a point that they refuse to reach: that in which they would perceive their suffering –and hence themselves *qua* victims– as useless and meaningless. If ETA fades away, their identity as “victims of ETA,” to which they clung for years, is equally condemned to fade away at some point. The new situation shakes the foundations of their reality –the way in which they *imagine* reality– and the whole of it does not make sense to them anymore. Nietzsche said that in cases of “weakness” and “disempowerment” suffering becomes the measure of all things ([1887] 1994). So what happens in this case –in which the suffering of the victims was once enshrined to the highest expression of civic virtues– when “the measure of all things” is rendered no-longer applicable? Does the existence of the victim have any purpose after the disappearance –although not destruction– of the enemy? If “the measure of all things” is no longer applicable is he or she still a victim? If so, for how long?

Being a victim can become a relevant part of who they are and how they relate to the world; and thus victims may not let suffering go: they may not want to let it go. If the actual person responsible for their loss is missing, he or she must be arrested, judged and sentenced. If arrested, and taken to court, any sentence other than the maximum penalty is considered too short and thus unjust. If sentenced to the maximum penalty, the latter is still considered to be too short in comparison with the crime committed. If the sentence is extended –as happened with the Parot Doctrine– that is not sufficient, for the criminal does not regret the crime. If the criminal regrets it that is not sufficient either, for that does not change what he or she did in the past and it does not change the fact that ETA keeps abducting and murdering people. If ETA says that it wants peace that is not enough, because they have not ceased fire unconditionally. If ETA unilaterally declares the permanent



cessation of violence that is not enough either, because they have not admitted all the suffering inflicted. If ETA recognises the unfair infliction of such suffering, that does not suffice for they have not apologised. If ETA apologises, that does not suffice either, for they “would not recognise” the legitimacy of the state and their intention would be that of entering the institutions in order to achieve the independence of the Basque Country, and so on and so forth...

Law implies a production of truth that goes beyond punishment or sanction, introducing guilt alongside truth (Hunt and Wickham, 1994). But what happens when there is a change in the production of truth?

Victims may find themselves living in melancholia: in the eternal postponement of the mourning and acceptance of their loss. They may find themselves experiencing a situation in which no resolution of the conflict appears to be the kind of resolution, the kind of justice, they sought. Their *demands* for legal punishment may be satisfied by the state, their *desire* for justice is sentenced to remain unsatisfied. In this regard, Lacanian psychoanalysis provides a distinction between demand and desire capable of giving an account of the unattainability of such desires. It will be studied in further detail in Chapter Four but, for the time being, it is important to point out that it raises –in conjunction with what has been said so far– certain questions: Would it be possible to think about the unattainability of this desire as a way of ensuring the persistence of the subjectivity of the victim as victim? If so, when does this subjectivity emerge? When ideology –law – triumphs, as Althusser says? Or when ideology fails, as Lacan would say?

As can be seen, the issue of subjectivity in relation to the law is far more complex than one may expect, and prompts the emergence of many questions of its own that exceed the limits of this section. And although certain aspects (such as mourning, melancholia, or the difference between demand and desire) and points of view (what about criminals?) have been left largely unexplained, the aim of this section is to theorise as particular that which has commonly been seen as homogeneous and universal: the legal subject. This is something that Wendy Brown (1995, 67) notices when she suggests that the inclination to see the legal subject in such a way appears as a consequence of the inner paradoxes of capitalism –“liberty

vs equality”, and “individualism vs homogeneity”–; and also Douzinas and Warrington in their analysis of liberal legal theory:

If the legal person is an isolated and narcissistic subject who perceives the world as a hostile place to be either used or fended against through the medium of rights and contracts, (s)he is also disembodied, genderless and a strangely mutilated person. The other as legal subject is a rational being with rights, entitlements and duties like ourselves [...]. But this conception of justice as fairness must necessarily reduce the concreteness of the other, it must minimise the difference of need and desire and emphasise the similarities and homologies between subjects (1994, 172)

Thus the main concern of this section and its future developments is unravelling, revealing and deepening into that which makes the legal subject something –or better said, someone– notoriously complex that escapes the theoretical framework of traditional legal theory. Namely, how the process of legal subjectivation additionally produces something that eludes generalisation and abstraction: a “Sensation S” of justice.<sup>23</sup>

### **Contingency**

#### *Contingency, prohibition and judgement: the book of Genesis*

The previous section began with an argument against the incongruity of trying to theorise subjectivity in purely abstract terms, and in order to avoid such inconsistency it started with the example of ETA and its victims, so there would be

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<sup>23</sup> The Sensation S appears in a thought experiment proposed by Ludwig Wittgenstein in his *Philosophical Investigations* ([1953] 1967, §258). The association of the recurrence of a certain sensation or feeling with a sign –such as “S” in his example, or “justice” in the context of this research– constitutes a case of “private language.” This implies that the “Sensation S” cannot be defined using other terms, nor can it be explained by means of ostensive definition. In the case of a Sensation S, “whatever is going to seem right to me is right. And that only means that here we can’t talk about ‘right’” (ibid.).

The importance of the “Sensation S” and the impossibility of placing it in public language becomes manifest in an example provided by Douzinas and Warrington in *Justice Miscarried* (1994, 223):

“The claim that fear and pain can be rationalised through the shared understanding of their cause puts the victim in a double bind. Either he is in fear of he is not. If he is, he should be able to give facts and reasons for it which, as they belong to the genre of truth, should match the assessment of the judge; if they do not, the refugee is lying. If, on the other hand, he cannot give ‘objective’ justifications for his fear, the refugee is again lying”

a minimal grounding of the theory. Nevertheless, and despite the attempt of grounding theory to reality by analysing this case, this theorisation of subjectivity was ultimately doomed to remain “out of joint”: a purely abstract approach would have jeopardised any attempt of emphasising the question of subjectivity, but even if one is mainly concerned about a ‘subject with a name of his own,’ a minimum level of abstraction is required whenever a new theoretical framework is to be posited.

Something similar happens with the question of contingency. It acts as a floating signifier –one single word meant to comprehend an infinite number of possible and actual situations– and yet it also stands in stark contrast with the abstractness of legal norms –meant to be equally applicable in all cases, in their totality, without referring to each of them in their specificities. A contrast between contingency and the law that opens the door to the appearance of certain question: is it possible to theorise contingency without turning it into a mere abstraction or generalisation? Is it possible to provide a proper theorisation of contingency *via contingency* –that is, via analysing a series of contingent situations in relation a given legal framework?

Once again, this research finds itself out of joint. And once again it seems impossible to choose between these two possibilities. If this study took a fully theoretical approach it would inevitably turn contingency into norm: into the generalisation of an infinite number of possible situations. For the sake of trying to comprehend all of these situations, it would finally comprehend none; and thus, it would turn out to be its very opposite: a general norm trying to rule out difference. However, the option of theorising contingency *via contingency* seems equally unfeasible insofar as it seems virtually impossible to analyse an infinite series of actual contingent situations. Not to speak of an infinite series of *possible* situations.

How to escape this impasse? How to theorise our object of study without betraying it? How to theorise contingency without turning it into the totality of possibilities? How to theorise it without turning it into its opposite? As happened before it seems impossible to escape this disjuncture, and the only way out seems to be not choosing any of the roads in front of us. The only way out is to make a way. But what kind of way?

The previous section introduced the case of ETA and its victims as a means to illustrate and contextualise the relevance of the question of subjectivity in this thesis. And, *mutatis mutandis*, I intend to do the same here with a different example. Its aim is to show how judgements about what is just or unjust appear as a result of contingent actions and struggles, and not prior to or without them. Nevertheless, it is important to highlight at this point that the case introduced here differs quite significantly from the previous one: it is not taken from “real life,” but from a commonplace. This is, the Christian interpretation of the book of *Genesis*: the biblical story of Adam, Eve, the Original Sin and the fall of man *from innocent obedience to guilty disobedience*.<sup>24</sup>

The biblical account of the fall can be structured in creation, commandment, innocence, temptation, disobedience, and acquisition of knowledge-guilt. The Bible says that after creation “[t]he Lord God took the man and put him in the Garden of Eden to work it and take care of it. And the Lord God commanded the man, ‘You are free to eat from any tree in the garden; but you must not eat from the tree of the knowledge of good and evil, for when you eat from it you will certainly die’” (Genesis, 2: 15-17). This passage encompasses the first two parts of the story: creation and commandment. On the sixth day, God created man in his image and likeness, and gave him dominion over all creatures: he gave him absolute power. But he also gave man one simple commandment: not to eat from the tree of the knowledge of good and evil. This reveals two things. The first one reminds us of the normative character of the law, and reflects that man could actually eat from that tree—for if he could not, there would be no need to forbid it. The second one is that this prohibition is not followed by any judgement in terms of “good” or “evil”: the tree from which Adam was forbidden to eat was “the tree of the knowledge of good and evil”, but God’s commandment was “you must not eat from the tree”, not “you must not eat from the tree *because that is bad*.” Surely one may argue that “for you when eat from it you will certainly die” entails that sort of judgement, but that seems inaccurate. In this biblical passage, God sets a rule and the consequence

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<sup>24</sup> Given the vast body of literature on this topic, addressing the question of the Original Sin here in its full extent would be virtually impossible. Therefore, this research will not enter into theological debates. It will simply use the case of Adam and Eve—in a rather theologically naïve reading of the story—as an example in which the relevance of contingency in relation to the law can be appreciated.

of breaking the rule in terribly descriptive terms: it is not a “if you do ‘X’, I will do ‘Y’”, but a “if you do ‘X’, ‘Y’ will happen.” In the same exact way as Nietzsche argued that there are no moral facts –but only a moral interpretation of them– there is no value judgement in this passage. God sets a rule, and God sets its consequence: whether this consequence is good or bad, he does not say. Therefore it is very important to keep in mind that the prohibition precedes any notion of “good” or “evil.”

The story continues with the creation of Eve and the state of innocence: “Adam and his wife were both naked, and they felt no shame” (Genesis, 2: 25). This passage is open, at least in principle, to two different interpretations: the first one would be that they felt no shame because, at that time, being naked was “good;” the other would be that they felt no shame because there was not such a thing as “bad” or “evil,” and, in consequence, there was nothing to be ashamed of. Following the line of thought presented in the previous paragraph, this second interpretation seems the most accurate one: if the concepts of “good” and “evil” had not yet been introduced into the world, man had no reason to feel ashamed of his acts, and thus could be considered to be in a state of innocent ignorance. The fourth part of the story, temptation, brings about a turn of events: “‘You will not certainly die’, the serpent said to the woman. ‘For God knows that when you eat from it your eyes will be opened, and you will be like God, knowing good and evil’” (Genesis, 3: 4-5). At this point the serpent reveals an “unknown known,” namely that God’s prohibition implied the very possibility of breaking it: that God’s prohibition reflected man’s power and freedom of choice. The question of freedom –and the anxiety that it entails (Kierkegaard, [1844] 2014) – is undoubtedly fascinating and worthy of a more in-depth analysis; however, the most pressing issue at this point of the story is that man is offered a way out of his ignorance: a way that may allow him to *know* –good and evil– and become like God. That is, he is offered the possibility of making value judgements. Interestingly enough, though, before this point only God had made this kind of judgement, and only after seeing his creations –that is, after creating– and only in terms of good. Man is offered the possibility of doing something that only God had done before: judging. And even more, he is offered something that God had never done: judging good *and* evil. One may wonder if man was tempted to be *just like God* or *more than God*. Like the “noble moralities”

described by Nietzsche ([1887] 1994), God appears as a triumphant affirmation of himself: everything that he does is intrinsically good because *he* does it. Therefore, he could never do evil. Following this idea, the sin of man would not have been the wish to be *like God* –judging good– but ambitioning to be *more than God*: being able to judge, both good *and* evil. And thus, the sin of man would have been wanting to judge in terms of good and evil, not only his own actions, but also others’...everything! In the end, the sin of man would have been no other than wanting to judge himself, and the world, in terms of good and evil.

God appears as a triumphant affirmation of himself: everything that he does is good *because he does it*. And he could not possibly judge otherwise because he could not act in a different way. In contrast, if man is to judge the world in terms of good *and* evil his actions could no longer be intrinsically “good”: they must be either good or evil. After eating the forbidden fruit man abandons his previous state of innocent ignorance and enters a reality of anxious uncertainty. The prohibition entailed the possibility of breaking it, and thus reflected man’s own freedom; after eating the forbidden fruit man remains equally free, but, unlike before, his actions are now subjected to the possibility of being *either* good *or* evil: they are subjected to uncertainty. However... did the serpent not say that “when you eat from it [the tree of the knowledge of good and evil] your eyes will be opened, and you will be like God, knowing good and evil”? How could man enter a reality of anxious uncertainty if he knows good and evil? And, ultimately, why would that happen?

After eating from the tree man becomes familiar with the notions of “good” and “evil”, and, in principle, that should be the end of the story: once he is able to judge in these terms, everything that exists should fall within one of these categories with no room for uncertainties. Nevertheless, that is not the end of the story, for judgements can *only* be made a posteriori. Surely one may argue that it would be possible to make a judgement a priori; yet that would not be a judgement, but a pre-judgement: a pre-judice. A priori judgements do not judge the facts, but establish our predisposition to facts that are yet to happen. As Kierkegaard said, “life can only be understood backwards; but it must be lived forwards” ([1843] 1938). It is impossible to judge “good” and “evil” a priori, for in order to judge anything, this “anything” must have happened before. In order to understand, we must live. And, ultimately, what provokes this state of anxious uncertainty in man is not knowing

if, in the end, his actions will be “good” or “evil.” What provokes this state is not committing a mistake, but knowing that one might be committing a mistake: being uncertain about the outcome of one’s actions. And that is why after eating from the tree “the eyes of both of them were opened, and they realized they were naked; so they sewed fig leaves together and made coverings for themselves” (Genesis, 3: 7). After eating from the tree, in their nakedness, they felt exposed, unsecure, and uncertain about their very nature. They found themselves unable to judge something that they had not done –their own bodies– and something that they had not done yet –live– and, therefore, they feared the presence of God and his judgement: they feared an uncertain outcome.<sup>25</sup>

Then the man and his wife heard the sound of the Lord God as he was walking in the garden in the cool of the day, and they hid from the Lord God among the trees of the garden. But the Lord God called to the man, ‘Where are you?’ He answered, ‘I heard you in the garden, and I was afraid because I was naked; so I hid.’ And he said, ‘Who told you that you were naked? Have you eaten from the tree that I commanded you not to eat from?’ (Genesis, 3: 8-11)

God’s questions in this passage are profoundly revealing. After calling Adam, his first question is “Who told you that you were naked?”, and it is only after that question that he asks “Have you eaten from the tree that I commanded you not to eat from?” God was not searching for Adam to punish him: it was Adam’s uncertainty and embarrassment that revealed to God what had happened. It was the contingent reaction to a contingent action that triggered the judgement. A judgement that, nevertheless, was not made in terms of “good” or “evil,” but in terms of setting the specificities of the consequence established when God commanded not to eat from the tree.

But what is contingency? What is its connection with this reading of the fall of man? And more importantly, why is it relevant to this research?

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<sup>25</sup> As stated above, God told Adam that he would certainly die if he ate the fruit from the tree of the knowledge of good and evil. But this outcome remains uncertain inasmuch as “death” itself had never been experienced before, and thus it remained unknown.

### *What is contingency?*

To put it simply, contingency is the character of that which is not necessary nor impossible. That is, contingency belongs to the realm of possibility: to the realm of that which may or may not happen. And because of that, contingency can also be understood as a consequence of the freedom of choice –implicit to any prohibition– and the unpredictability of its outcomes. Its connection with the biblical story presented above lies precisely in this aspect. God’s commandment not to eat from the tree reflected man’s freedom: Adam and Eve could eat from the tree, for if they could not there would be no need to forbid such an action. In a very similar way, lawmakers do not legislate over –or against– the law of gravity or the laws of thermodynamics –after all, what punishment, if any, could be imposed over nature if these laws stopped working tomorrow?– since it would make no sense at all to forbid something which is either impossible or unavoidable: we only forbid or regulate that which is possible, that which can be done, and thus that which is contingent.

The connection and relevance of contingency to this research appears clear at this point: contingency is the very thing that creates the conditions of possibility for legal norms and legal theory. It is its primary limit, but also its ultimate limit. Without contingency, there can be no law; and yet, laws have to be applied to any possible situation meeting certain characteristics established in the legal text. The problem is that legal norms must remain abstract if they are to be applied to a totality of situations; situations that, nevertheless, are contingent inasmuch as they may happen or not, and contingent inasmuch as their specificities cannot be fully detailed in the legal norm –if the latter is to remain as such. That is to say that, although the law needs contingency to come (back) into existence, it cannot provide the latter with full presence.

Contingency is an ontological requirement of the law, a constituent limit that creates the conditions of possibility for legal norms and legal theory. However, its role as a constituent limit does not end there. Contingency is a “bottom limit” –creating the conditions of possibility of/for the law– but also an “upper limit”: it is that which the law can never reach or grasp. It is that which is so specific, precise, unpredictable, and, ultimately, random, that cannot be given full presence in a legal



text. And it is the departing point of the law, but also the unbridgeable chasm between the abstract legal norm and its application. It is a specific actual conflict that takes place at one particular moment and place, between specific subjects with particular backgrounds, ideas and interests: a necessary space of undecidability that the law cannot occupy, at least not completely.

What actuality is cannot be rendered in the language of abstraction. Actuality is an *interesse* [between being] between thinking and being in the hypothetical unity of abstraction. Abstraction deals with possibility and actuality, but its conception of actuality is a false rendition, since the medium is not actuality but possibility. Only by annulling actuality can abstraction grasp it, but to annul it is precisely to change it into possibility. Within abstraction everything that is said about actuality in the language of abstraction is said within possibility. That is, in the language of actuality all abstraction is related to actuality as a possibility, not to an actuality within abstraction and possibility. Actuality, existence, is the dialectical element in a trilogy, the beginning and end of which cannot be for an existing person, who qua existing is in the dialectical element. Abstraction merges the trilogy. (Kierkegaard, [1846] 1992)

Nevertheless, the relevance of contingency for this research is not limited to its role as “bottom” and “upper” limit of the law. In fact, the biblical story of the creation and fall of man reveals something much more relevant. Namely, that it is only in the face of contingent struggles that we start debating about what is just or unjust in relation to the law. As stated above, “life can only be understood backwards; but it must be lived forwards” (Kierkegaard, [1843] 1938). It is only after Adam and Eve had eaten from the tree that their actions could be judged. It is only after they broke the law that the latter could be enforced. And, in the same way, it is only after the law has been enforced that we can start thinking about the adequacy, validity and legitimacy of the punishment it imposes. Therefore contingency acts as the bottom and upper limit of the law, but also as another sort of limit: a sort of limit that unavoidably puts into question its very functioning.

The law has to be enforced in order to come (back) into existence, but its very enforcement provokes and triggers debates about its functioning, calling it into question. And this is the reason why contingency is highly relevant to this research: it constitutes a “bottom” and “upper” limit, but also permits and problematizes the functioning of the law –creating a space in which the other two limits, subjectivity and justice, can enter the debate.

### *The disturbing effects of contingency: creating a space for debate*

Mutatis mutandis, contingency could also be seen, in this sense, as the irruption of the Real in the register of the Symbolic: something that disturbs the normal functioning of the structure but at the same time reflects the constituent limits that permit its functioning. Doubtlessly, this claim may seem bold and rather speculative since the disturbing effects of contingency may not seem sufficient to consider it as “the irruption of the Real”. Nevertheless, two reasons support this idea. The first one is that contingency can be considered as the irruption of the Real in the Symbolic order of law inasmuch as it escapes full symbolisation –by definition, legal norms must remain abstract if they are to be universally applicable, and thus they cannot comprehend all the specificities inherent to a particular case: the names of the subjects, their body or the specific date and place. The second one is that contingency as such lacks ontological consistency –it is but floating signifier that stands for an infinite number of possible situations– and yet it has to be presupposed in order to create the conditions of possibility for the enforcement of the law and allow it to come (back) into existence. Hence contingency acts as the irruption of the Real in the register of the Symbolic: it acts as an impenetrable kernel resisting full symbolisation, and as a pure chimerical entity with no ontological consistency. It is lived onwards, but constructed and understood backwards, and creates a space in which the other two limits, subjectivity and justice, can enter the debate.

### *Contingency and language*

The later work of Ludwig Wittgenstein –*Philosophical Investigations* ([1953] 1967) – may be useful in order to clarify this and explain how contingency allows the emergence of questions of subjectivity and, especially, justice in relation to law and legal theory. Against the arguably essentialist approach taken in the *Tractatus Logico-Philosophicus* ([1921] 1981), the later Wittgenstein upheld that most philosophical problems –such as ‘what is justice?’– are but the consequence of conceptual confusions in language; so even if we struggle to provide a clear definition of justice in purely abstract terms, in the end, “meaning is use.” Thus, according to the *Philosophical Investigations*, there would not be such a thing as a “Platonic justice” whose existence could ever be independent and unaffected by that of just and unjust deeds. But how can we possibly talk about justice if we cannot

refer to a clear concept of it? Can we ever be sure that we are talking about the same thing as our interlocutor? If we are not... would it be possible to fully understand what our interlocutor is trying to tell us? Could we reach an agreement? What factors could affect the nature of this agreement?

As with many other major philosophical concepts, “justice” is, first and foremost, an abstract concept. Unlike what happens with the law, in the case of justice there is no clear text we can refer to and say “this *is* justice.” The abstractness of the concept makes it very difficult to provide clear ostensive definitions of it insofar as the use of concrete examples –“just deeds”– could vitiate the pretensions of generality of the concept.<sup>26</sup> And, ultimately, the intention of providing a clear definition of justice through an example would be rendered useless due to a lack of general projection, for any definition based on an example would automatically fail to explain the role and meaning of justice in any other contingent situation. In view of this one may also think that providing a purely abstract definition of justice would be more suitable; however, such a definition would be meaningless and purposeless. To an extent, it would be tantamount to a legal norm with no stipulations whatsoever about the characteristics of the cases to which it is to be applied. A purely abstract definition of justice would be meaningless inasmuch as it would exclude *in toto* the contingent situations in which debates about justice are brought about: trying to overcome the difficulties entailed by the use of examples by means of providing a purely abstract definition of justice would lead to an aloofness from social reality and the specificities of actual debates about justice. And it would also be purposeless because, indeed, it would be possible to have a definition of justice; but what is the point in having a definition of the concept if it is impossible to apply to actual controversies about justice? Ultimately, it would be but an exercise of metaphysical chauvinism with no real concern for the actual use of the term.

If we are to think about justice as a constituent limit of the law and legal theory it is necessary to avoid this sort of abstraction and focus on the actual use of the term. That is to say, that it is necessary to focus on justice, not as a concept, but as a category of understanding: how it is used, under what circumstances, and for what purpose. Thus if we are to think about justice as a constituent limit, we have to think

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<sup>26</sup> See *Philosophical Investigations*, §27-34, §258 and §270.

about contingency: we have to think about the use of the term “justice” and its relation with the law. As happens with the word “game” (Wittgenstein, [1953] 1967, §66), it might be impossible to provide a clear definition of justice, but that does not matter: even if we do not have a definition, we still use the word. And that use is always contingent.

As discussed above, contingency appears as a constituent limit of the law in three different ways: as a *bottom limit* –creating the conditions of possibility of/for the law– as an *upper limit* –that which the law can never reach or grasp– and as an *ontological limit* –permitting and, at the same time, problematizing the functioning of the law. Legal norms need to be enforced in order to come (back) into existence, in order to remain in-force; and yet, this enforcement also brings about debates regarding the very functioning of the law: calling it into question and creating a space in which the other two limits, subjectivity and justice, can enter the debate. Therefore contingency appears relevant inasmuch as it problematizes the functioning of the law, but also inasmuch as it underlies the other two limits: subjectivity and justice. On the one hand, a legal norm requires particular struggles in order to come (back) into existence; and yet, it does not need “this” or “that” struggle, but “a” struggle. It needs a conflict which may or may not happen –neither necessary nor impossible, and thus contingent–; and, therefore, it does not need “the” subjects of “this” or “that” struggle, but the contingent subjects of a contingent struggle. On the other hand, this need of contingency and contingent subjectivity also entails contingent debates about justice. A contingent struggle with contingent subjects may have as an ultimate philosophical consequence a future debate about the very idea of justice; but, in the end, what it brings about is a specific debate about the justness or unjustness of the law in relation to a particular case: it brings about a contingent debate about the use of the term “justice” in a particular context. That is, the meaning that the different parties in conflict confer on the word “justice”. And, ultimately, meaning *is* use... and every use is contingent.

The very idea that the world or the self [in this case, justice] has an intrinsic nature [...] is a remnant of the idea that the world is a divine creation, the work of someone who had something in mind, who Himself spoke some language in which He described His own project. [...] To drop the idea of languages as representations, and to be thoroughly Wittgensteinian in our approach to language, would be to de-divinize the world. Only if we

do that we fully accept the argument I offered earlier –the argument that since truth is a property of sentences, since sentences are dependent for their existence upon vocabularies, and since vocabularies are made by human beings, so are truths. (Rorty, 1989, 21)

But if use and meaning are contingent, how can we possibly talk about justice without referring to a clear concept of it? Can we ever be sure that we are talking about the same thing as our interlocutor? If we are not...would it possible to fully understand what our interlocutor is trying to tell us? Could we reach an agreement? What factors could affect the nature of this agreement? These questions prompt the next sections of this research. Nevertheless, for the time being, it is important to emphasise and take into account that even though the meaning of justice –*signified*– is contingent, and even subjective, the term itself seems to operate as an *empty signifier*:

An empty signifier is, strictly speaking, a signifier without a signified. [And it can] only emerge if there is a structural impossibility in signification as such, and only if this impossibility can signify itself as an interruption (subversion, distortion, etcetera) of the structure of the sign. That is, the limits of signification can only announce themselves as the impossibility of realizing what is within those limits – if the limits could be signified in a direct way, they would be internal to signification and, *ergo*, would not be limits at all. (Laclau, 2007, 37)

That is, the term “justice” operates, in its contingent use, as the announcement of an impossibility of signification: as the impossibility of giving full presence to particular struggles and claims for justice within a given legal framework, as the mirror image of *the power to name* – “the originary violence of language which consists in inscribing within a difference, in classifying... [i.e.] to think the unique within the system, to inscribe it there, such is the gesture of arche-writing: arche-violence” (Derrida, 1976) – and as the mirror image of the attempt of reducing difference to identity and generality: of the attempt of reducing life in its radical contingency to abstraction.

The precarious but necessary balance between abstraction, subjectivity, universality and contingency reveals the role of justice, and its undecidability, as the third and ultimate constituent limit of the law.

## **The incompatibility between law and justice in their relation with subjectivity and contingency**

The previous two sections expanded upon the role of subjectivity and contingency as constituent limits of the law, disclosing the role of justice as its third and ultimate limit. These sections have helped us reach a point in which we can finally see how justice operates as an empty signifier in its relation with the law. In other words, they have helped us see the way in which this term announces an impossibility of signification: the impossibility of giving full presence to particular calls for justice within the law.

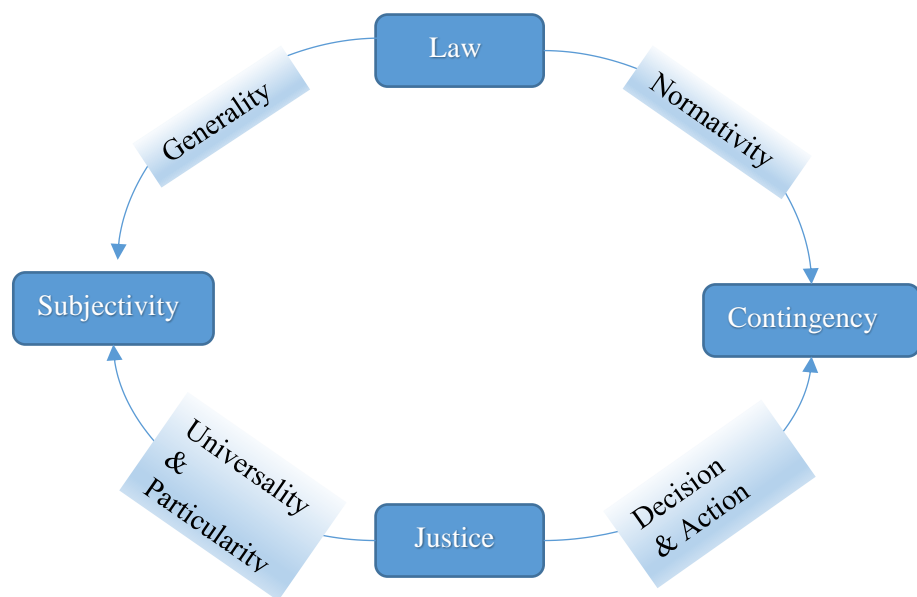
In view of this, it would seem appropriate to address the question of justice and its role as ultimate constituent limit of the law. Nevertheless, there is something that has been intentionally omitted so far: the relation of justice with contingency and subjectivity. And, throughout the last two sections, this chapter has remained deliberately silent about this. If the rationale behind this approach –the rationale behind this *silence*– is to be understood, we need to stop for a moment and take a step back. Let us recapitulate. The first chapter of this thesis began with the classical roots of current academic debates about justice, drawing our attention to the problematic character of certain assumptions in these debates. In consequence, it was stated that the departure point of this research could not be a literature review of current debates on justice, but a study of the conditions that allow the emergence of struggles over the meaning of justice; and the first and foremost requirement for this emergence is the existence of a normative framework. Thus, the departure point of this research had to be an analysis of the normative framework *par excellence*: law. Four different schools of legal thought –Natural Law, Legal Positivism, Legal Realism and Critical Legal Studies– were analysed and criticised in that chapter, highlighting how the four of them seem to neglect the same thing: how the four of them seem to be blind to the living breathing human being.<sup>27</sup> This common blind-spot became manifest throughout the study of contingency and subjectivity as

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<sup>27</sup> The living breathing individual human being: “[t]he man of flesh and bone; the man who is born, suffers and dies –above all, who dies; the man who eats and drinks and plays and sleeps and thinks and wills; the man who is seen and heard; the brother, the real brother” (Unamuno, [1913] 1972).

constituent limits of the law in this chapter. And, finally, we saw how these limits permit the emergence of justice as its third and ultimate constituent limit. Given the development of this argument it would have not made sense to make clearer the relation between justice, contingency and subjectivity before this point. But now, and before proceeding to the next stage of this research, it is necessary to clarify this question: What is the relation between justice and subjectivity? What is its relation with contingency? What is the difference between this relation and the one between law, contingency and subjectivity?

The following diagram illustrates the relation of justice with contingency and subjectivity in contrast with the relation of Law with these concepts.



As can be seen, law and justice appear in relation to subjectivity and contingency in the context of this research; and yet, both approach these “limits” from opposite directions. Whereas the law relates to subjectivity in terms of generality, justice does so through universality and particularity; and whereas the law appears connected to contingency via normativity, justice relates to it through

decision and action. Thus both law and justice appear asymmetrically –if not antagonistically– related to subjectivity and contingency.

*Subjectivity: generality, universality and particularity*

Expanding on the previous paragraph, this section will elaborate upon the extant relation between subjectivity, law and justice. And, more precisely, how this relation appears under the form of generality in the case of the law, and under the form of radical particularity and universality in the case of justice.

Once again, let us begin with the law –and generality– in order to see how justice –along with particularity and universality– emerges from its limits.

In our previous analysis of subjectivity as constituent limit of the law it was stated that society cannot exist without the latter, for the structures of domination imposed by it on individual human beings create the very conditions of possibility for society as such. This means, in other words, that without the aforementioned structures of domination there could be a complexity or aggregate of human beings, but not a society. The latter only comes into existence when its members stand as a unity (Althusser, [1970] 2001): when they are legally constituted as subjects, as citizens. And, therefore, law and society exist as such insofar as (1) they are imposed on individuals and (2) they provide these individuals with a sense of belonging or unity. In consequence, legal norms must remain abstract if they are to be applied to the generality of subjects belonging to that society: a generality of subjects which is distinguishable from *a* particular subject and the whole of humanity.

This need of enforcement reveals law as a normative system. It produces subjectivities in the process of being enforced, and yet –as a system– these subjectivities only gain relevance in their contrast with others which are excluded from that legal framework –e.g. citizens from other states. Hence these “subjectivities” only gain legal relevance –and thus, legal *identity*– in their *difference* from the subjectivities produced by other legal systems. In the process of differentiating its citizens from foreigners, the law reduces every difference among citizens to identity; and, in turn, any similarity between citizens and foreigners to difference. Ultimately, this means that the law always operates in



terms of generality, excluding particularity and universality from its domain. And, as I will argue, this is the basic difference between law and justice in their relation with subjectivity: whereas the former operates in terms of generality, justice always functions in terms of universality and particularity.

The production of these sets of identities and differences reveals, in turn, the symbolic character of the law. A symbolic character that has been hinted throughout this chapter but becomes manifest at this point. Just as happens with other sociocultural productions –such as language, norms, mores, institutions, practices, or customs– the law can be framed within the Lacanian register of the Symbolic as a trans-subjective milieu that pre-exists individual human beings and constitutes them as subjects within a structure. This constitution takes place through the introduction of negativities in the register of the Real, in the form of the creation of antagonisms, gaps, etc. And, in the law, this introduction of negativities appears crystallised in the legal-illegal and citizen-foreigner dichotomies. It is crystallised in the exclusion of the particular and the universal.

This exclusion becomes manifest in the articulation of demands of justice; an articulation that generates a surplus: desire. But, in order to get a better grasp of this question, it is necessary to turn once more to Lacanian psychoanalysis and make clear the difference between need, demand, and desire.

The concept of need could arguably be defined as the fact of feeling the lack of something;<sup>28</sup> in this case, the lack of justice in a situation perceived to be unjust. The satisfaction of needs normally requires us to interact with other human beings, and thus they must be articulated as demands –expressions and behaviours that can be interpreted as a signal of the existence of such need. According to Lacan, one must accept and speak “the discourse of the Other” if one’s needs are to be recognised and addressed by others. But, in the end, speaking the discourse of the Other excludes the possibilities of speaking in terms of particularity or universality. On the one hand, if the need is expressed as pure particularity in some sort of “private language”<sup>29</sup> –as the exact conflict *W* over the particular object *X* between the contingent subjects *Y* and *Z*– the law as Other cannot understand the message,

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<sup>28</sup> Not necessarily at a biological level.

<sup>29</sup> See *Philosophical Investigations* (Wittgenstein [1953] 1967, §243-§271).

for a particular case becomes legally relevant in so far as it can be subsumed within broader legal categories. On the other hand, if the need is expressed in terms of pure universality the law as Other cannot know that we are addressing it in order to find satisfaction. In consequence, demands must be shaped under the terms imposed by a socio-symbolic Other: in the terms prescribed by the law; which are, by definition, terms of generality. And yet, it is important to note that this demand has a twofold function, for on the one hand it articulates the need; but, on the other, every demand also constitutes a demand for love.

This leads to the third and final concept of this triad: desire. As stated above, desire appears as the generation of a surplus in this process of articulation. It emerges as that which remains after need is deduced from demand: the outcome of a process of symbolisation that charges needs with surpluses –demands for love– disclosing the position of the subject in the relation with the Other. In this way, the law can satisfy the need that has been articulated as a demand for justice in legal terms, but not the desire lurking behind it. Here, the desire for justice of the subject appears as a demand for love...and love is “giving something you haven't got to someone who doesn't exist” (Philips, 1994, 39). In his desire for justice the subject urges the law to provide him with something that it cannot give: full presence. Before the law, the subject is only relevant in his role as citizen, as the speaker of the language of the law... but nothing else. Name, history, personality, tastes, fears, suffering, and joy... none of them are relevant: only the role of the subject as citizen. Law cannot love. It cannot give what it does not have to someone who does not exist. It cannot give full presence to particularity; and, for the law, the living breathing subject, the “man of flesh and bone,” does not exist: only the citizen. Here, the desire for justice of the subject reveals itself as constitutive lack. It reveals itself as a wish to be universally recognised in one's own particularity.

Justice emerges and becomes differentiated from the law in the formulation of this desire. It grows out of the struggle between the urge to satisfy this desire and the impossibility of finding full satisfaction in the law. It appears in the questioning of the law and its functioning. And so does the subject... not just as citizen –subject of the enunciated– but also as radical particularity –subject of the enunciation–: as that which makes ideology work, and as the point in which it fails. In both cases the divide or negativity introduced by the law produces subjectivities; and although the

production of subjectivity as such is inherent –and hence necessary– to this process, the specific subject that it constitutes is always contingent... as is his desire.

Every desire for justice appears as the expression of a radical particularity that claims universal validity; and thus as the expression of the limits of generality. The desire for justice of the subject –along with the impossibility of its fulfilment– puts into question the functioning of the law, revealing the limits of its authority and normativity: the limits of its might. In turn, the law also conceals its impotence through the denial of this desiring-beyond-demand, labelling it as a wish for vengeance.<sup>30</sup> But, ultimately, the denial of such a desire for justice entails a denial of the subject himself, for every subject is a desiring subject, and the subject who ceases to desire ceases to live too. It is possible to find an example of this in *Don Quijote*. In Chapter V, during one of his first adventures, The Knight of the Woeful Countenance fell off his horse and –in order to regain courage and keep on his quest– started reciting epic poems to himself, vowing to perform even greater deeds than those of the heroes he admired. Nevertheless, he was seen by his neighbour, Pedro Alonso, who started mocking him, saying that he was talking nonsense:

“Ni vuestra merced es Baldominos, ni Abindarráez, sino el honrado hidalgo del señor Quijada.”<sup>31</sup>

Don Quijote’s response to such offense was categorical: “¡Yo sé quién soy!”<sup>32</sup> –meaning, according to Unamuno ([1904] 2004) “¡Yo sé quién quiero ser!”<sup>33</sup> Vowing to perform greater deeds than any other knight before him, Don Quijote is telling us that, in the end, he knows who he is because he knows who he wants to be: he knows who he is because he knows what he wants to do. Just like Zarathustra, Don Quijote strives for his work. And he lived for as long as he strived... and he died when he stopped doing so. Don Quijote died when he resigned. Don Quijote died when he accepted his role as the person that he was told to be: Don Alonso Quijano. And his entire world, full of giants, knights, romance and bravery died along with him.

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<sup>30</sup> The difference between justice and vengeance will be analysed in detail throughout the next chapter.

<sup>31</sup> “Your worship is neither Balwin nor Abindarráez, but the worthy gentleman Senor Quijada”

<sup>32</sup> “I know who I am!” (my own translation)

<sup>33</sup> “I know who I want to be!” (my own translation)

“Whoever destroys a soul, it is considered as if he destroyed an entire world. And whoever saves a life, it is as if he saved an entire world.” (Talmud, Mishnah Sanhedrin 4:9)

The universality of Don Quijote died along with his most radical particularity, buried under the gravestone of generality: of the Symbolic.

The disavowal of the desire of justice enacted by the law in an attempt to conceal its own impotence is tantamount to this sort of death. And yet, the subject who finds rejection and denial where he sought recognition cannot resign, not completely, for absolute resignation amounts to absolute death.<sup>34</sup> Whether this persistence of desire takes a form or another is question that will be further explained over the following chapters. But, for the time being, it is important to remember, once again, that justice calls for the universal recognition of a particularity; and thus requires an immediate relation between the particular and the universal. A direct and immediate relation that inaugurates a suspension –if not destruction– of the general at the same time that reflects the universal particularity of desire.

*Contingency: normativity, decision and action*

Generality loses importance in the relation between law and contingency, but another basic feature of the law gains relevance its place: normativity. As seen in the previous section on subjectivity, the existence of society as such –and thus, generality– depends on the possibility of imposing the law on individuals – constituting them as legal subjects, citizens– and providing them with a sense of belonging or unity. And it is this “imposition” that appears as the quintessence of normativity: the very condition of possibility for the existence of a relation between law and subjectivity marked by generality.

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<sup>34</sup> See here what Sancho Panza tells his master, Don Quijote, while the latter is in his deathbed (Chapter LXXIV):

*"¡Ay! –Respondió Sancho llorando–. No se muera vuestra merced, señor mío, sino tome mi consejo y viva muchos años, porque la mayor locura que puede hacer un hombre en esta vida es dejarse morir sin más ni más, sin que nadie le mate ni otras manos le acaben que las de la melancolía"*

*"Ah! –Said Sancho weeping–. Don't die, master, but take my advice and live many years, for the most foolish thing a man can do in this life is to let himself die without rhyme or reason, without anybody killing him, or any hands but melancholy's making an end of him"*

In this manner, the relevance of normativity seems clear. References to its importance as a fundamental characteristic of the law can be found in the work of authors such as Walter Benjamin, Sigmund Freud, Louis Althusser or Jacques Derrida. And, according to the latter (1990), this basic feature is reflected in the fact that the law imposes itself upon individual human beings, legitimating itself in the process of doing so –an act of *mythic violence* (Benjamin, [1921] 1996). Thus the difference between legal violence and illegal violence appears as a difference in a *quantum* of force that legitimises itself in terms of quality –legitimacy. Any act of violence beyond the law is deemed as illegitimate and pernicious; and not just because of the direct effects of these acts, but also because they challenge, and even threaten, the very authority of the law. Under the threat of punishment, the “majority more powerful than each of the individuals” (Freud, [1930] 1963) prevents these individual human beings from taking justice into their own hands. And, in connection with the question of generality, we could arguably say that only when such violence becomes monopolised by an elite –being legitimised as law– it becomes possible to talk about society: only when the relations between two individuals are regulated by a third party which stands more powerful than the other two, society exists.

The connection between normativity and contingency can be derived from this. On the one hand, the imposition or prohibition of certain behaviours by law unavoidably implies that these behaviours are neither impossible nor necessary, but contingent –that is, possible. It reveals that the subject can always act otherwise. And, on the other, it also implies that the law always rules future actions on the basis of past experiences and already-established prescriptions: the past is irreversible –and thus necessary, for the way in which it happened cannot be changed– and the rule of law and the generality that it entails prohibit *ad hoc* judgements.<sup>35</sup> It may be possible to pass a law *on the basis of* a case, but not *for* a specific case. Hence the law always rules the future on the basis of the past, creating a mediation between them that entails a certain blindness with regard to the specificity –the particularity– of the present.

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<sup>35</sup> The dismissal of the “Parot Doctrine” by the European Court of Human Rights constitutes a perfect example.

This legal mediation between the future and the past shows that the temporality of the law is inherently *chronological*: sequential, a succession of moments in which the present always appears as the future of a past and as the actualisation of a near future –as the missed encounter between a “not yet” and a “too late.” And it is precisely this “missed encounter” that opens a window of opportunity for justice.

Unlike the law, justice appears as pure immediacy. It emerges as that which reclaims a direct relation between the particular and the universal. Justice “doesn’t wait [...] a just decision is always required immediately. [...] the moment of decision, as such, always remains a finite moment of urgency and precipitation” (Derrida, 1990). A desire for justice always calls for the universal recognition of a particularity, for equalising it to another particular case or using it as the basis for future cases entails a denial of this very particularity. In this manner, the temporality of justice appears in stark contrast with that of the law. Whereas the temporality of the latter always operates in a sequential manner; that of justice appears as a time-lapse, as the window of opportunity that emerges from the missed encounter between a “not yet” and a “too late.” Or, in other words, whereas the temporality of the law presents the character of *Chronos*, the temporality of justice has the character of *Kairos*.<sup>36</sup>

Justice always appeals to the present, to a moment in which decision and action are required immediately, right away. And, in this moment, past, present, and future collide. Here the subject<sup>37</sup> is given the opportunity to realise that everything that has happened so far has led him to this point; but also that everything that will happen from that moment on will be conditioned, if not determined, by what he decides to do at this point. In this missed encounter, in this present, the past can be redeemed and the future can be saved: kept open and freed from the yoke of the past. The temporality of justice manifests itself as a present of decision and action with the potential to suspend the law and create a space of timelessness and timefulness, colliding the chronological past and future.

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<sup>36</sup> In opposition to the sequentiality of “Chronos”, the Greek term “Kairos” appears as the right or supreme moment: a time-lapse in which everything happens and an opportunity can be seized. In Christian theology it refers to the action of God: “the appointed time in the purpose of God.”

<sup>37</sup> As subject of the enunciation and subject of the enunciated.

## Conclusion

With the intention of filling the lacuna discovered in our previous study of legal theory, this chapter has taken the relation between such a particular subject and the law as a departing point for the construction of a theoretical edifice meant for the study of the production of subjective understandings of justice. This required considering two basic features of the law in its relation with the subject: generality and normativity. Our analysis of the first of these features revealed that while the law necessarily produces subjectivities, such subjectivities are eminently contingent and virtually endless in their particularity –something that leads, in the end, to the exclusion of the particularity of the subject from the domain of the law. On the other hand, the study of the normative character of the law revealed that it must be susceptible to being broken insofar as its very existence depends on its enforceability, and it cannot be enforced unless it is broken: unless a subject decides to act against it. However, just as the legal production of subjectivities results in the emergence of an endless variety of particularities, the application of legal norms presents some problems of its own. Namely, that its application can never be directly conducted towards the resolution and recognition of the particularity of *the* case it aims to solve. Its resolution may be based on previous cases and may as well set a precedent for future ones, but the possibility of passing a legal norm *ad hoc* appears excluded.

The analysis of these two characteristics, along with the dynamics that they seem to generate in the interactions between the law and the subject, revealed in turn three constituent limits of the law: contingency –the structural incapability of the law to recognise the particularity of the case presented by the subject– subjectivity –the clash between the general character of the law and the subject’s wish to see his particularity universally recognised– and justice –the cornerstone holding together the previous two limits and underpinning the will of the subject to find recognition in spite of the shortcomings of the law.

Finally, the last part of this chapter was dedicated to the study of the relation between the abovementioned characteristics of the law and the constituent limits of the latter. A relation that opens the door for the consideration of three basic dimensions of analysis in the study of the production of subjective understandings

of justice: contingency, desire, and temporality. Three dimensions of analysis that will centre the attention of the second part of this thesis. In the first place, and introducing the cases of two victims of terrorist attacks, Chapter Three will investigate the question of contingency and its role in the formation of narratives of justice in response to the shortcomings of the law through a meaning-making process. Secondly, Chapter Four will focus on the unconscious mechanisms behind such narratives and on the way in which the particularities of the law as Other seems to pave the way for the emergence of desires for justice. Chapter Five will consider the differences between the temporalities of law and justice, along with their effects on our understanding of this concept. And last but not least, the Interlude between these chapters and the conclusions of this thesis will discuss the relation between all three dimensions of analysis in order to demarcate a field of possible understandings of justice –also offering an ideal typology á la Weber on the basis of it.



## CHAPTER THREE

### Narratives of Justice:

#### Contingency between Fate and Character

If one considers chance to be unworthy of determining our fate, it is simply a relapse into the pious view of the Universe which Leonardo was himself on the way of overcoming when he wrote that the sun does not move [...] we are all too ready to forget that in fact everything to do with our life is chance, from our origin out of the meeting of spermatozoon and ovum onwards [...] We all still show too little respect for Nature which (in the obscure words of Leonardo which recall Hamlet's lines) "is full of countless causes ('ragioni') that never enter experience."

Every one of us human beings corresponds to one of the countless experiments in which these "ragioni" of nature force their way into experience.

(Sigmund Freud, *Leonardo da Vinci: A Memory of His Childhood*)

#### **Encounters with political violence, subjectivity, and the law**

##### *Enter Irene Villa*

17<sup>th</sup> of October 1991, at 8:00 am Commander Francisco Caballar dies as a result of the explosion of a bomb placed in his car by ETA members. A few minutes later, Irene Villa, 12 years old, is having breakfast and watching the news with her mother, María Jesús González, before going to school. For the first time in her life, she learns about the existence of ETA, and a few moments before getting into the car she asks her mother if they could have placed a bomb under their car too. González, a civil servant who worked at a police station issuing passports and ID cards, answered that there was nothing to worry about, that they were not that important. After getting into the car and starting the engine, a bomb explodes: María

Jesús suffers the loss of her right arm and leg, and Irene loses both of her legs and several fingers on her left hand.

A first ambulance arrives, and since it seems that Irene is beyond salvation, they prefer to take her mother in the first place. Moments later a second ambulance makes its appearance, the same one that could not save Commander Caballar, and the medics take Irene to a different hospital. After the surgery, María Jesús wakes up, and seeing the damage on her right side she asks the nurse about her daughter. The answer is devastating: nobody else arrived with her. For three days she feared the worst, remaining in complete silence until her father paid her a visit and said: “Child, won’t you ask about your daughter?” That day everything changed for her: “That was like being born all over again, I felt as if I had grown wings, I no longer cared about my situation. My daughter was alive!”<sup>38</sup>

In the meantime, Irene was fighting for her life in a different hospital. Her father, having learnt about her severe injuries, told the doctors to let her go: he did not want a life of suffering for his child. He would rather suffer her loss in silence than seeing her lead a crippled life, a tortured life. The surgeons ignored his request and saved Irene’s life. Being a teenage girl who enjoyed playing basketball with her friends and wanted to become a model, discovering the loss of her legs was an incredibly traumatic experience. Nevertheless, few days later she finally managed to see her mother for the very first time since the explosion. Both of them were physically injured, but emotionally they were in very different situations: on the one hand, Irene could not overcome the loss of her legs and fingers; on the other, María Jesús ‘no longer cared’ about her own injuries. All that mattered to her was that her daughter was alive when she had thought her dead. In this context, their first encounter was marked by the first question that Irene asked her mother: “why did this happen to us?”

She was trying to make sense out of a situation that she suffered but could not understand. And yet, the answer that she received from María Jesús would change her life as much as the loss of her legs:

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<sup>38</sup> Interview with *Un Tiempo Nuevo*, Telecinco (03/01/2015): “Eso fue como un renacer, como que me salían alas, como que ya no me importaba lo que tenía. Ya, mi hija estaba viva.”

My child, we can cry just like you're doing now. We can curse and blame these people...we have every right to do so. But that would make us very unhappy. Hatred only causes pain to the person who feels it, and it wouldn't hurt them...not in the slightest. But we have another option: forgiving. We can think that we have been born like this [...] and do everything we can to be happy.<sup>39</sup>

Irene decided that she had been born without legs. And every year since 1991 Villa and her mother have celebrated their birthdays on the anniversary of the attack, as if they had, indeed, been born again that day. After recovering from her injuries in a record time, Irene decided to put into practice the advice she had received from her mother, becoming a successful journalist, writer, psychologist, and para-alpine skier who has travelled the world sharing her experiences with others and giving talks about trauma, self-overcoming, forgiveness, etc.

The brutal images of her attack, along with her fast recovery and later professional success made her, almost immediately, one of ETA's most prominent victims since the conflict started in 1958. Along with Admiral Carrero Blanco – who died in 1973 and was meant to be Franco's successor– and later on José Antonio Ortega Lara –kidnapped by ETA for almost two years between 1996 and 1997– and Miguel Ángel Blanco –councillor for the small town of Ermua, in the Basque Country, kidnapped and executed in July 1997– the history of Irene Villa would become a central part of the pantheon created around the victims of ETA by the Spanish Government in its struggle against ETA. And yet, in spite of being among the highest-profile victims of ETA, and in view of the increasing politicisation of the figure of the victims by Spanish media and political parties, Villa decided to abandon the Association of Victims of Terrorism in 2007. Refusing to be used for electoral and political purposes, Irene Villa has remained almost completely silent in this regard ever since, arguing that that part of her life is over, and even stating that she wants to get rid of the label of 'victim of ETA':

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<sup>39</sup> Ibid: "Hija mía, podemos llorar como tú estás haciendo ahora, maldecir a esta gente...que tenemos todo el derecho del mundo. Pero esto nos trae en consecuencia que seremos muy infelices, porque el odio sólo daña al que lo siente, y a ellos no les llega ni un poquito. Así que, también tenemos otra opción, que es la de perdonar, pensar que hemos nacido así [...] y hacer todo lo posible por hacer feliz."

That year [2007] I started competing in para-alpine skiing, and during the Championship of Spain they only asked me about the negotiations, and about this or that judge or ETA member. I was competing at a national level! It was my career!<sup>40</sup>

I'd rather be known as the journalist, the athlete, the speaker, or the psychologist, than as a victim of ETA.<sup>41</sup>

[I am tired] of having my whole career reduced to that [being a victim of ETA]. The truth is that they keep identifying me with a group I do not want to have anything to do with, not even being its victim, because I feel responsible for my life and my future. Only me.<sup>42</sup>

We can never be victims, not even if we suffer the detonation of a bomb: we are responsible for our lives, for our future.<sup>43</sup>

The interest of the antagonistic relation between victimhood and responsibility established by Villa cannot be easily dismissed, but it cannot be disconnected from another element that has become a recurring topic in her interviews and talks: forgiveness. Villa and her mother have commonly supported an “egoistic” [Sic.] understanding of forgiveness. Namely, that it is the person who forgives who receives the greater benefit in doing so. And while Villa admittedly understands the situation of those victims who cannot let go of hatred and resentment,<sup>44</sup> she claims to have forgiven the people responsible for her attack for her own sake, for her own well-being:

If you forgive you can rest, be happy, and go on with your life. If you don't, you cling to the past.<sup>45</sup>

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<sup>40</sup> Interview with *Diario de Burgos* (08/12/2013): “Ese año [2007] empecé a competir en esquí alpino asistido y, en pleno campeonato de España, solo me preguntaban por la negociación, por el juez no sé quién, por determinados presos o por un etarra. ¡Yo estaba compitiendo a nivel nacional! ¡Era mi carrera!”

<sup>41</sup> Interview with *Qué!* (16/12/2013): “me gustaría que en vez de como la 'víctima de ETA' me conocieran como la periodista, la deportista, la conferenciante o la psicóloga.”

<sup>42</sup> Interview with *La Opinión A Coruña* (27/12/2013): “[Estoy cansada] Sobre todo de que toda mi trayectoria se reduzca a eso [ser víctima de ETA], aunque creo que cada vez es menos. Lo cierto es que me siguen identificando con una banda con la que nunca he querido tener nada que ver, ni siquiera ser su víctima, porque yo me siento responsable de mi vida y de mi futuro. Solo yo.”

<sup>43</sup> Interview with *El Hormiguero*, Antena 3 (12/12/2014): “No somos víctimas jamás, ni aunque nos pongan una bomba: somos responsables de nuestra vida, de nuestro futuro.”

<sup>44</sup> Interview with *Qué!* ((16/12/2013).

<sup>45</sup> Interview with *Un Tiempo Nuevo*, Telecinco (03/01/2015): “El que perdona es el que descansa, el que es feliz, el que puede seguir con su vida. El que no perdona, se ancla.”

[To forgive is] to become free from those who hurt you and make a new start. [...] Once you forgive, you are free...and you don't look back. If you do, well, that is because you never forgave to begin with.<sup>46</sup>

One must forgive in order to continue to live, although there are a lot of people who don't forgive. [...] It doesn't matter where you come from, but where you are going to. [...] The person who benefits the most from not hating is you. So why should I keep hating and suffering if they won't receive any harm from it?<sup>47</sup>

The constant emphasis on forgiveness in Villa's discourse is remarkable, but it opens a space for questioning too. For instance, the recurrence of this topic in her conferences and public talks may put into question the true extent of her rejection of the label of victim. As stated above, Villa has frequently refused to be categorised as such, and yet there seems to be a contradiction between this purported rejection and the way in which her talks are normally framed. The content of her talks revolves around the importance of forgiveness, but the relevance of this topic for Villa and the weight of her words can only be understood inasmuch as she is seen –first and foremost– as a victim of political violence. Arguably, such statements would not have the same value or influence if they were made by someone who suffered similar injuries in a car crash after being hit by another person driving under the influence of alcohol. And, in the same way, the importance of forgiveness in her discourse could not be understood if she presented herself as a journalist or a sportswoman rather than as a victim of political violence.

The purpose of her regular emphasis on the importance of forgiveness may also be more complex than meets the eye. Seemingly, most interviewers ask her about this topic, and yet one may wonder if this repetition is not about forgiving, but about forgetting. In this regard, repeating can be seen as a way of not remembering (Freud, [1920] 1955). But if that is so, what is it that she is trying to forget? Given the complexity of her case there are many possible answers to this question. However, there are at least two of them that might be worth considering. On the one hand,

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<sup>46</sup> Interview with *La Opinión de A Coruña* (27/12/2013): “[Perdonar es] liberarte de quien te ha hecho daño y empezar de nuevo. [...] Cuando perdonas, te liberas y no vuelves atrás, si lo haces, es que nunca perdonaste.”

<sup>47</sup> Conference *Lo que de verdad importa* (15/11/2011): “Hay que perdonar para poder seguir viviendo. Y hay mucha gente que no perdona. [...] No importa de dónde vienes, sino a dónde vas [...] El principal beneficiado de no odiar eres tú. Entonces, yo, para qué voy a estar odiando y sufriendo si a ellos no les va a llegar.”

Villa might be trying to forget the suffering she experienced after the attack: the initial confusion and anger that followed the discovery of her loss. If that were the case, the fact that Villa and her mother celebrate their birthday on the anniversary of these events would gain significance in her narrative: the bombings that caused their loss would have occurred in a time before their lives had even begun, and thus they would not have really experienced them. The memory of the attack would be but a phantasmatic experience, a nightmare that she wants to forget. The other possible interpretation of her discourse to be considered here is that Villa might not be trying to forget her suffering, but her inability to forgive. In the same manner that a narcissistic person tries to cover and make up for his insecurities and self-hatred projecting an image of self-love and success –that he hopes others would recognise and return to him– it is possible to imagine a situation in which someone unable to forgive could display an image of forgiveness before others, hoping to become one with that mask. In a way, it would be the enactment of Pascal's idea: act as if you believed, and eventually you will believe.

Undoubtedly, these interpretations are but pure speculation. It would be impossible for us to know whether Villa has forgiven or not, or if she is trying to forget rather than to forgive. Nevertheless, the purpose of these two hypotheses is not so much to 'reveal the truth' beneath her narrative as it is to problematise the different ways in which the elements within it could be organised. Forgiveness, political violence, loss, justice, moving on, self-overcoming, redemption, suffering, hatred...all of them form part of Villa's discourse. All of them are relevant, but, ultimately, the kind of narrative and the subjective understanding of justice resulting from this meaning-making process will depend not so much on the elements present in the narrative, but on the way in which they appear organised in it. The case of Ángeles Pedraza, another victim of political violence who has undergone arguably similar experiences, can help us get a better grasp of the relevance of this 'narrative structure.' As explained below, Pedraza's narrative of justice shares many of the elements present in Villa's. And yet, it will make it possible to see how similar elements and experiences organised in different ways can result in entirely different narratives and understandings of justice.

The morning of the 11<sup>th</sup> of March 2004, three days before Spain's general elections and nearly 13 years after the bombings of Irene Villa and María Jesús González, ten bombs were detonated almost simultaneously aboard four different commuter trains near Atocha Train Station, in Madrid. As a result of the explosions, 192 people were killed and over 2,000 were wounded. This would be the biggest terrorist attack in the history of Spain and Europe.

Widespread controversy and confusion followed the attacks. The conservative People's Party (PP) –then in office, and led by Prime Minister José María Aznar – held that the Basque separatist group ETA was responsible for the bombings. This group normally issued warnings before any form of mass bombing, and always claimed responsibility for its actions afterwards, so the situation became increasingly confusing when ETA released a public statement that day denying all involvement with this attack. At that point some people started questioning the theory of the Spanish Government, including the Socialist Party (PSOE) –its main rival in the upcoming elections. Over the next few days an increasing amount of evidence strengthened these doubts, pointing to a different author: an al-Qaeda-related terrorist cell.<sup>48</sup>

The public support of the Government dropped almost immediately. Prime Minister José María Aznar had turned the fight against ETA into an electoral flagship, and thus the involvement of this group in the attacks would have strengthened the position of his party in the face of the forthcoming elections. However, if the people responsible for the bombings were not ETA activists but members of an extremist Islamist group, the public reaction would be anything but supportive. In 2003, with the opposition of all other political parties and vast sectors of Spanish society, the Government led by José María Aznar openly backed and offered military support to the invasion of Iraq. The popular unrest caused by this decision was silenced by the good economic situation and the absolute majority of Aznar's conservatives in the Congress and the Senate, but the demonstrations that

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<sup>48</sup> With nearly two hundred casualties, the sheer scale of the attack and its apparent disconnection with ETA's regular targets (e.g. politicians, police officers, members of the military) pointed to a very different form of violence. This was confirmed later on by the study of the devices used during the bombings, different from those normally used by ETA activists.

had been ignored then would return, with redoubled strength, as a consequence of the 2004 bombings. The conservative party was seen as responsible for the attacks and, more importantly, accused of lying to the Spanish people for electoral gain. As a result, the Socialist Party won the elections three days later.

Ultimately, the bombings were judicially attributed to an Islamist cell, whose surviving members were tried and found guilty. However, the People's Party and conservative media continued to support conspiracy theories involving the National Police Corps, Guardia Civil, al-Qaeda, ETA, and the Socialist Party plotting to remove them from office. Not unexpectedly, the arguments and accusations between both parties grew considerably bitter over the next few years. The Popular Party –now led by Mariano Rajoy– encouraged the biggest association of victims of terrorist attacks in Spain, the 'Asociación de Víctimas del Terrorismo' (AVT), to express its discontent and doubts regarding the authorship of the bombings as determined by the Spanish judiciary. In this context, the association grew closer to extreme right-wing political stances, becoming the activist-branch of the conservative party and accusing the –then– Prime Minister José Luis Rodríguez Zapatero of lying, betraying the dead, and conspiring with terrorist organisations.

And this is, precisely, where Ángeles Pedraza comes in. The night before the attacks, her daughter Myriam (25 years old) and her husband visited Pedraza to ask her for a suitcase: they were flying to London in the morning. Pedraza knew that they had to take a train to Atocha in order to get to the airport, so when she heard about the bombings her first reaction was to call her daughter. No one would answer her phone calls. Fearing the worst she decided to visit Atocha Train Station, El Pozo del Tío Raimundo Station, Santa Eugenia Station, and Calle Téllez –the places where the four trains had exploded. Not being able to find her daughter, she visited every hospital between Madrid and Guadalajara –60 km away from the Capital. Myriam was not there. Desperate, and now certain that her daughter was not alive, Pedraza decided to go to the morgue, where she had to identify the body of her daughter.

In the aftermath of the attacks Pedraza joined the AVT, becoming its leader between 2010 and 2016. As stated above, the first term in office of the socialist Prime Minister José Luis Rodríguez Zapatero (2004 – 2008) was haunted by the



controversies and bitter arguments that followed the 2004 bombings. The AVT, led at that time by Francisco José Alcaraz, played a major role in the conservative attempts of delegitimising the Government. And although Pedraza was not the president of the association at the time, her mandate was just as militant as that of her predecessors, organising countless demonstrations and mass rallies against issues such as the repeal of the Parot Doctrine<sup>49</sup> by the ECHR, the legalisation of the political party 'Bildu',<sup>50</sup> the release of ETA prisoners for health reasons,<sup>51</sup> any form of negotiated end to the conflict, and the announcement of a permanent ceasefire declared by ETA in October 2011.

The ceasefire was declared during the last months of the second term in office of Prime Minister Zapatero. In different circumstances the Socialist party could have capitalised this event for electoral gain, but the breakout of the Great Recession in 2008 and the subsequent austerity measures had led to unprecedented levels of discontent among the Spanish population, and in the elections they suffered one of the biggest debacles in the history of Spanish democracy. Due to the ceasefire and the apparent end of the Basque conflict, the conservative Government of Mariano Rajoy –elected Prime Minister in November 2011, shortly after the aforementioned ceasefire– found an unexpected accuser in Pedraza. This new scenario offered the possibility of realistically ensuring an end to a political conflict that had ravaged Spain for more than 50 years. However, the AVT had grown to be one of the biggest political lobbies in Spain –thanks, among other things, to the patronage of Mr Rajoy's People's Party– and they were not willing to accept the end of the struggle. The new Government chose to ignore the will of its former political allies, and as a consequence they faced new accusations of weakness and betrayal. The activist branch of the conservative party grew even bolder in its demands when two years later, in 2013, the European Court of Human Rights repealed the Parot Doctrine and, on the basis of the extant treaties, the Government and the Supreme Court accepted to release –and compensate– those members of ETA who had been subject to it. In this case, the organisation led by Pedraza went as far as to require the Spanish Government to suppress the Supreme

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<sup>49</sup> See Chapter Two.

<sup>50</sup> Bildu is a Basque nationalist and leftist political party.

<sup>51</sup> Particularly the recently deceased Josu Uribetxeberria Bolinaga.

Court and abandon the European Convention on Human Rights and the European Union.

Ever since her election as president of the AVT, Ángeles Pedraza became the living embodiment of a relentless effort to bring a police-based end to the activity of ETA, declaring that she wanted peace, but only if it came along with the defeat of ETA. A defeat that she did not see.<sup>52</sup>

At this point it should be possible to glimpse how a different narrative articulation of similar elements and experiences can result in entirely different understandings of justice. But what are the factors that may have led this former shop assistant to quit her job and devote herself exclusively to this fight against an enemy that is virtually defeated? Why did she become a ‘full-time victim’ unlike Irene Villa, who rejects this label?

In the same manner that every case of political violence has its own prehistory, every subject touched by one of these cases has a prehistory of his own. The prehistory of ETA can be tracked down due, among other things, to the vast amount of media coverage that it received over five decades of conflict. The same applies to Irene Villa, whose life has been well-documented thanks to the early age at which she suffered the bombings of 1991 and her later professional developments. The case of Ángeles Pedraza, however, is different. Her life before the 2004 bombings is relatively unknown –just that she was born in Montilla (Córdoba), used to work as a shop assistant, and was divorced and had two children at the time of the attacks: Myriam, who died during the bombings, and Javier, who is still alive. She did not become a public figure until 2008, when she was elected vice-president of the AVT, at the age of 51. In consequence, the only elements of her life that we can draw upon in order to fathom the factors that may have led her to adopt such a radical stance against ETA are her public statements, interviews, and speeches since 2008. However limited in scope such analysis might be, there are certain recurring topics in Pedraza’s activity that may allow us to get a better grasp of the differences between her and Villa, and how two people who have undergone similar experiences have ended up in arguably opposite extremes.

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<sup>52</sup> Interview with *El País* (09/11/2011): “Quiero la paz, pero también la hubiera querido antes. La quiero con la derrota de la banda. Ahora no la veo.”

In contrast with Villa and her emphasis on forgiveness, justice appears as the key element in Pedraza's narrative. Over and over again, Pedraza has claimed that all she wants is justice, making it the cornerstone, not just of her own narrative, but also of several protests –including the demonstration organised in response to the repeal of the Parot Doctrine in 2013. And yet, curiously enough, her claims for justice tend to be followed by the same postscript in every occasion. Namely, that what she wants is justice, not revenge.

Today we fight for justice. Today we do not want revenge, we never wanted it. All we ask for is justice. [...] not rancour, but justice. [...] We demand one thing, and one thing alone: complete and total Justice.<sup>53</sup>

At this point, I would like to problematise once again how different ways of organising the elements appearing in a narrative can result in diverging understandings of justice. In principle, it may seem that what has led Pedraza to become the embodiment of a police-based fight against ETA is her unshakeable thirst for justice, but there are certain aspects of her speech that suggest caution to this approach. For instance, her insistence on denying a wish for retribution could also be interpreted as a response to the increasing number of criticisms received by her association over the last few years –especially since 2011, when ETA declared a permanent ceasefire and the AVT opposed it. But given that in the context of the abovementioned demonstrations she was addressing like-minded people from her own organisation, it could also appear as a clear case of *excusatio non petita, accusatio manifesta* –he who excuses himself, accuses himself. It could be that, by denying a wish for revenge, Pedraza may actually be making it manifest. But if it is justice and not vengeance what she wants...what does she mean by ‘complete and total justice’? What is necessary for her to feel that she has attained it?

We insist: in order to achieve justice, the end of terrorism must be an end with victors and losers. [...] And we will never stop fighting for our most elemental right, no matter what: our right to an end of terrorism with justice, memory, and dignity. That is to say, an end of

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<sup>53</sup> Demonstration in Madrid against the repeal of the Parot Doctrine (27/10/2013): “Hoy luchamos por la justicia. Hoy no queremos venganza, como no la hemos querido nunca. Sólo pedimos justicia. [...] No es rencor, es justicia. [...] Sólo pedimos una cosa, y sólo una: Justicia completa y con mayúsculas.”

terrorism that will allow all Spaniards to say: ‘Our immense sacrifice was worth it, we won. And they, those murderers, have lost.’<sup>54</sup>

In contrast with Villa’s views on justice, which she identifies with social reintegration after having undergone the corresponding legal punishment,<sup>55</sup> Pedraza links her wish for justice with the disappearance of ETA. For her, the possibility of attaining ‘complete and total justice’ appears as ultimately dependent on the ‘complete and total disappearance of ETA’: not the end of the struggle, but a crushing defeat of ETA.

By making use of this arguably Schmittean friend-enemy distinction, Pedraza seems to be not only admitting the political character that she has so often denied to this conflict,<sup>56</sup> but also excluding ETA from Spain *qua* political community. And, interestingly enough, by means of this exclusion Pedraza seems to be granting and reasserting as well a key point in ETA’s nationalist credo –their *Basqueness* as lack of *Spanishness*– conversely configuring Spanish nationalism in its opposition to ETA, simultaneously identifying the Spanish nation with the victims and the fight against terrorism in a rather interesting chain of empty signifiers (Laclau, 2007).<sup>57</sup>

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<sup>54</sup> Ibid.: “Insistimos en que para que haya justicia el final del terrorismo debe ser un final con vencedores y vencidos. [...]Y nunca, jamás, cueste lo que nos cueste, dejaremos de defender nuestro derecho más elemental: el derecho a un final del terrorismo con justicia, con memoria, y con dignidad. Es decir, a un final del terrorismo que nos permita decir a todos los españoles: nuestro inmenso sacrificio ha merecido la pena. Hemos ganado, y ellos, los asesinos, han perdido.”

<sup>55</sup> Interview (04/12/2013): “Nunca es tarde tampoco para arrepentirse, quizá obcecado en una idea, [...] claro lo que sí que pienso, y eso es que para vivir en una sociedad con un Estado de Derecho es normal, es la justicia. Después de haber pasado, de haber pagado por el daño que has hecho sí que mereces reinsertarte, y sí que mereces tener otra vida, después de haber expiado tu culpa, por supuesto.”

<sup>56</sup> During the demonstration in Madrid against the repeal of the Parot Doctrine (27/10/2013) she claimed that “there is no war here, no conflict, but murderers and innocent victims.” (“Aquí no ha habido guerra, aquí no ha habido conflicto, aquí ha habido asesinos y víctimas inocentes.”)

<sup>57</sup> In this regard, it is important to take into account two historical factors. On the one hand, under Franco’s Dictatorship, Spanish nationalism became essentially reactionary: constructed in opposition to communism, Basque and Catalan nationalism. On the other, in the aftermath of the dictatorship Spanish nationalism became largely discredited due to its links to Franco’s regime. The transition to democracy resulted in “pact of forgetting” that implied that the new democratic regime would not delve into the past and bring to the political arena a debate on the victims of Francoist repression (50,000 to 200,000 casualties). In spite of their lack of visibility, these victims haunted the politics of the Spanish right wing, undermining the democratic legitimacy of the People’s Party. However, during the 1990s former Prime Minister José María Aznar (PP) was –unsuccessfully– attacked by ETA, and from that moment on his party aimed

In consequence, her claims about a ‘complete and total’ end of ETA seem to present at least two difficulties. On the one hand, the possibility of a complete and total disappearance of ETA and all its members would involve as well –according to her own narrative– the possibility of a complete and total disappearance of the victims when not of the Spanish nation as such –since they appear to be constituted, in the end, in contraposition to the activities of this group. On the other –and this is perhaps one of the most shocking aspects of Pedraza’s stance– ETA had nothing to do with her loss: her daughter was killed by an al-Qaeda-related Islamist cell that was dismantled shortly after the 2004 bombings, and there have been no other actions of this kind ever since. ETA plays an important role in the Villa’s narrative...but why does it seem to play an even bigger role in Pedraza’s? Why ETA and not al-Qaeda? Why ETA only after the 2004 bombings and not before?

One could argue that Pedraza’s actions may have been driven by a sense of solidarity with other people who have undergone experiences of political violence, but that would not account, in the end, for the fact that her activism started only after the 2004 bombings under the patronage of the conservative party.

We are all here because we are not willing to move on, to turn the page and forget what has happened in this country for more than 50 years.<sup>58</sup>

This cannot end, nor be forgotten.<sup>59</sup>

ETA might not to be the cause of her loss, but it has become a guilty agent for it nonetheless. It has become the embodiment of her pain:

For every sufferer instinctively seeks a cause for his suffering; more exactly, an agent; still more specifically, a guilty agent who is susceptible to suffering –in short, some living thing upon which he can, on some pretext or other, vent his affects, actually or in effigy: for the venting of his affects represents the greatest attempt on the part of the suffering to win relief, anaesthesia –the narcotic he cannot help desiring to deaden pain of any kind. This

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to turn the fight against this group and the recovery of Spanish nationalism into one of the hallmarks of the Spanish right wing. Counting with victims “of their own” became a way of gaining democratic legitimacy for the sake of their party and Spanish nationalism.

<sup>58</sup> Demonstration in Madrid against the repeal of the Parot Doctrine (27/10/2013): “Todos estamos aquí porque no estamos dispuestos a pasar página, a olvidar lo que ha ocurrido durante más de 50 años en este país.”

<sup>59</sup> Interview (10/03/2014): “Esto ni puede zanjarse, ni se puede olvidar.”

alone, I surmise, constitutes the actual physiological cause of resentment, vengefulness, and the like: a desire to deaden pain by means of affects. (Nietzsche, [1887] 1994)

Maybe the members of the Islamist cell responsible for the 2004 bombings disappeared “too soon” to give Pedraza the opportunity to vent her suffering upon them; and thus Pedraza might have had to find a new cause for her pain that would not disappear any time soon, a cause capable of sustaining her narrative for an indefinite amount of time. ETA and the fight against it for the supremacy of Spain could be this cause –both, as origin and goal.

(Seekers of justice). There are those who, if science ever made it possible, would like to extend the lifespan of criminals by up to 1,000 years, so they could serve 1,000 years in prison. Wasn't it God who did that when he founded eternity, so the damned could eternally suffer in hell? (Sánchez Ferlosio, 1993, 127, my translation).

Ángeles Pedraza seems to displace the resentment caused by her suffering from al-Qaeda to ETA, and when the latter threatens to disappear she rejects that possibility. Her narrative was meant to restore meaning to her life, and the disappearance of one of the pillars of such narrative would render her suffering meaningless. Suffering appears here as the key element, as the cause and trigger of the creation of her entire narrative...but what are the origins of the suffering stirring her alleged desire for justice?

Undoubtedly, the keystone of her pain can be traced back to the dramatic loss of her daughter Myriam. And yet, it is not only the biological death of Myriam that matters here, but also the disappearance of a person who played a fundamental role in Pedraza's own life. In other words, the origin of her pain is not just the real loss, but also the symbolic loss for which Myriam stands.

Pedraza has repeatedly stated that she cannot accept a negotiated end to the conflict with ETA. In her opinion the victims “have already been too generous,”<sup>60</sup> and thus public authorities and tribunals alike should be up to the sacrifices they have made.<sup>61</sup> The choice of words is very revealing, but if there is a concept that

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<sup>60</sup> Interview with *El País* (20/10/2011): “Las víctimas ya hemos sido demasiado generosas.”

<sup>61</sup> Demonstration in Madrid against the repeal of the Parot Doctrine (27/10/2013): “Pedimos que todos los poderes públicos, los jueces, que estén a la altura de nuestro sacrificio. Y a la altura de lo que hemos dado. A la altura de lo que España merece y necesita.”

stands out among the rest in Pedraza's phrasing, that undoubtedly is 'sacrifice.' That seems to be the way she sees her loss –and, arguably, the losses of the other victims– as a sacrifice: as something offered to a deity or higher cause. As a meaningful loss which, in spite of all the suffering that it may entail in its own right, carries within itself the promise that "it won't have been all for nothing."

In Agamben's *Homo Sacer* (1998), sacrifice is described as the act of conferring meaning to a loss, but it is also said that it is impossible to sacrifice that which is not one's own to give. Hence, it may seem too far-fetched to state that Myriam chose to give her life for a higher cause –either the unity of Spain, the fight against ETA, or any other– when that day she was but another citizen headed to the airport to catch a flight. But did Pedraza offer Myriam's life in exchange for something? Undoubtedly it was not hers to give, but in one of her statements she seems to suggest the opposite:

I don't forgive the life they took, nor all the suffering of that day, but even less the fact that they prevented me from becoming a grandma for life.<sup>62</sup>

Here can be seen the symbolic loss for which Myriam stands: she was not only Pedraza's daughter, but also a way for her to become a grandmother. Consequently, this could be understood as a loss of lineage, as a promise of the symbolic that has not been fulfilled (Frosh, 2013) due to the intervention of a third party. Pedraza not only lost her daughter, but also the possibility of seeing fulfilled some of her expectations in life. It is not just Myriam's life that was lost, but also the role that she played in Pedraza's symbolic universe.

However, spectres arise at the end or death of something (Derrida, 2006). The life that was lost cannot be recovered, but the role that it played in someone else's life lives on as a remainder: haunting us. Myriam died in 2004, but the unfulfilled promises and expectations caused by her absence keep haunting Pedraza's life, and the symbolic role once played by Myriam is now occupied –and played– by her loss. The 2004 bombings tore down Pedraza's symbolic universe: Myriam had been replaced by the loss of Myriam, and this change required an equally dramatic shift in Pedraza's life and narrative. She found a renewed sense of purpose in her crusade

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<sup>62</sup> Interview with *La Razón* (13/03/2012): "No les perdono la vida sesgada ni el calvario de aquel día, pero, mucho menos, que me dejaran para toda la vida sin ser abuela."

against ETA, and her loss came to play a fundamental role in it: becoming, in the end, the flagship and cornerstone of her fight.

Pedraza did not sacrifice Myriam's life, nor her role: she lost them. Undoubtedly there is a need to confer meaning to a loss like this, and for that purpose she embraced a new narrative centred on the fight against ETA. The issue of her sacrifice may require further consideration, but for the time being we cannot rule out the possibility that Pedraza's sacrifice might have been other than her daughter's. Perhaps, the possibility of having taken justice into her own hands – instead of relying on the rule of law out of fear of legal punishment.

Configured as a victim by that renunciation –along with other factors such as the historical and political moment, the extant legal definitions, group membership, etc. – and unlike Irene Villa and María Jesús González, Ángeles Pedraza fully embraced her newly acquired condition. So much so that she even quit her job to devote herself exclusively to the activities of the AVT. Pedraza sees herself as a victim wholeheartedly:

There is no war here, no conflict, but murderers and innocent victims.<sup>63</sup>

The victims are not responsible for anything. We are absolutely innocent.<sup>64</sup>

We will keep showing our disagreement with all initiatives aimed at the recognition of the existence of some purported 'victims of state violence' and their equalisation with the victims of terrorism.<sup>65</sup>

"There are only two sides: murderers and victims;" "if you do not support the victims, then you support the murderers;" "victims are absolutely innocent and murderers are absolutely guilty;" etc. This form of discourse has found wide coverage in Spanish media and political parties, resulting in an array of prefabricated pseudo-arguments against ETA now shared by most of the population of the country. And, in this regard, even if Pedraza sees herself as a victim, to an extent she has also been a victim of victimisation: a form of victimisation fostered

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<sup>63</sup> Demonstration in Madrid against the repeal of the Parot Doctrine (27/10/2013): "Aquí no ha habido guerra, aquí no ha habido conflicto, aquí ha habido asesinos y víctimas inocentes."

<sup>64</sup> Ibid.: "Las víctimas no somos responsables de nada. Somos absolutamente inocentes."

<sup>65</sup> Interview in July 2012: "Seguiremos mostrando nuestro total rechazo a todas las iniciativas dirigidas al reconocimiento de unas supuestas 'víctimas del Estado' y a su equiparación con las víctimas del terrorismo."



and nourished by Spanish political parties and institutions, aiming to create a social reality that equates any attack on the victims with an attack on society as a whole. By doing so the state manages to posit itself –and hence society– as a victim of crime and tries to equal the interests of the victims to its own, denying –in turn– the category of “victim” to others that may have suffered as much at the hands of the same institution for whose sake Pedraza claims to have sacrificed the life of her daughter.

The cases of Villa and Pedraza could not seem more radically opposed, but there seems to be a common element to both cases: through the deployment of meaning-making processes they have managed to create narratives –that have allowed them, to some extent, to escape a series of experiences so dramatic that they could even be considered as ‘traumatic,’ reshaping their lives and providing them with a renewed sense of purpose

### **Framing contingency, inventing narratives**

What is the reason for including these cases at the beginning of this chapter? Why these two particular cases? What is their function? What is their role in this research? How do they contribute to the process of reconceptualising justice in relation to subjectivity and law?

In order to answer these questions I will look at two different dimensions: the relation between the cases and this research, and their connection with the following two chapters –that will respectively address the topics of desire and temporality in relation to justice.

The experiences lived by Villa and Pedraza shattered their narratives of life – one wanted to play basketball and become a model, the other expected to have a quiet life devoted to her work and family– forcing them to make sense out of something that seemed to lack any of it: they had to create new narratives in order to regain a sense of purpose and restore meaning to their lives. The study of these narratives, which imply subjective notions of justice, will allow me to closely look at the process of positioning of the subject in relation to the law. Hence the main goal of this chapter is to study the relation between contingency and the creation of

subjective narratives of justice, taking the abovementioned cases as opposite poles demarcating a field of possible narratives.

Secondly, the study of the questions of contingency, desire, and temporality conducted in this chapter and the following ones aims to cover three dimensions of analysis with the goal of offering a reconceptualisation of justice from the limits of the law. Although clearly distinct from one another, these dimensions appear as three aspects of the same phenomenon: the emergence of subjective understandings of justice. Therefore, these cases will not only hold sway over this chapter, but also over the two following ones, providing us with a clearer understanding of the importance of desire and temporality in the formation of subjective understandings of justice. The “Interlude” included between Chapter Five and the conclusions seeks to clarify the relation among all three dimensions while also proposing an ideal typology á la Weber of possible understandings of justice: a typology that will take the cases of Villa and Pedraza as the two extremes of a spectrum in which other intermediate understandings of justice could be located.

However, and before reaching that point, it is necessary to go back to the topic of contingency and the cases opening this chapter in order to grasp a better understanding of the role of the histories of Villa and Pedraza in the elaboration of the abovementioned typology.

Between its foundation in 1958 and the permanent ceasefire declared in 2011 ETA had been active for more than fifty years, and over that lapse of time it killed 829 people and injured thousands. There are hundreds of different cases that could have been chosen for this chapter. And yet, the histories of Villa and Pedraza provide us with something that other cases do not share: remarkable similarities, and even more astonishing differences. On the one hand, both subjects have undergone dramatic encounters with political violence, and both of them have created narratives in the aftermath of these encounters that have allowed them to carry on with their lives. On the other, and in spite of their arguably similar departing points, their narratives have produced extremely divergent understandings of justice: Villa’s emphasis on forgiveness resulted in the production of a narrative tending to equate justice to legal punishment, whereas Pedraza seems to understand justice as the total and complete disappearance of the

enemy. Resorting to the same mechanism in their attempts to overcome similar dramatic experiences, they have reached opposite extremes. And that is why they have been chosen above all others for this chapter: they appear as opposite poles of the same spectrum, and the radical opposition between them allows us to demarcate a field for other intermediate positions.

The unbridgeable gap between both entices us to wonder about the reasons that may have led Villa and Pedraza to assume such different stances. In order to study this question there are, at least, two different dimensions that require further consideration: (1) the milieu of elements comprising the background of their narratives, and (2) the narrative structure articulating them. Due to the significant number of elements that feed into their narratives –ranging from psychological factors or family history to political preferences– an in-depth analysis of the first of these two dimensions presents us with a level of complexity that exceeds the scope of this research and may even call for a project solely focused on it. Consequently, in the following sections I will take into account some of these aspects, but under two provisos. First, instead of considering all the factors present in each narrative, I will focusing my attention on the structure underpinning the most relevant ones in each of them. And second, the relation between the factors considered over the next few sections and the narratives produced by both subjects should not be taken as an attempt to find a direct relation of causality that could explain their diverging outcomes. In this regard, and following Weber’s scepticism towards causal analysis in social sciences, it is important to remember that “any causal [...] explanation in comparative sociological analysis is unlikely to be right” (Needham, 1962, 122), and, in consequence, any serious study in this field should be “more like interpreting a constellation of symptoms [rather] than tracing a chain of causes” (Geertz, [1973] 1993, 316). Therefore, I will not try to offer a univocal causal explanation for the diverging attitudes of Villa and Pedraza towards justice, but to explore the organisational structure articulating the constellation of factors that may have conditioned their reactions; and, most importantly, the role played by contingency in this regard.

Over the last few pages there have been several references to “the unexpected” and “the possibility of the unexpected” as key elements in the development of the abovementioned narratives: as the factors that destabilise and call into question our understanding of the world, jeopardising our plans and expectations in life, forcing us to rethink our relation to the symbolic networks we inhabit. Mentions that resonate with echoes of one of the most relevant concepts in the work of Alain Badiou (1988): the event. And yet, as I will argue, event and contingency are not exactly the same.

It is difficult to find a clear and univocal definition of ‘event’ in the work of Badiou, but it is possible to find an approximation to this concept in *The Communist Hypothesis*:

I call an ‘event’ a rupture in the normal order of bodies and languages as it exists for any particular situation [...]. What is important to note here is that an event is not the realisation of a possibility that resides within the situation or that is dependent on the transcendental laws of the world. An event is the creation of new possibilities. It is located not merely at the level of objective possibilities, but at the possibility of possibilities. Another way of putting this is: with respect to a situation or world, an event paves the way for the possibility of what –from the limited perspective of the make-up of this situation or the legality of this world– is strictly impossible. [...] We might also say that an event is the occurrence of the real as its own future possibility (Badiou, 2010, 242-243)

For Badiou, reality is not something ‘solid’ or stable, but an ‘inconsistent multiplicity’ grounded in a void which is, at the same time, void and excess.<sup>66</sup> Phenomena such as law and ideology help to cover up and mask this unstable foundation that, nevertheless, remains present: locked within ‘the excluded part.’<sup>67</sup> The event, therefore, appears as that which happens when the excluded part irrupts the social scene in a sudden and drastic way. It breaks the appearance of normality, creating a space in which reality can be disclosed in its true inconsistent

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<sup>66</sup> It is possible to see at this point the connection between Badiou’s work, the Lacanian register of the Real, and Heidegger’s ‘Abgrund.’

<sup>67</sup> The constitutive character and importance of this ‘excluded part’ has been highlighted over the last few years in the work of Slavoj Žižek –especially in his book *Less than Nothing: Hegel and the Shadow of Dialectical Materialism* (2013). Prior references to this topic can also be found in the work of Hegel himself, and Nietzsche’s *Thus Spoke Zarathustra* ([1883] 2006): “If one takes the hump from the hunchback, then one takes his spirit too.”

multiplicity. In this ‘return of the repressed,’ the event tears apart the very fabric of law and ideology, dispossessing them of their purported natural character, and creating the conditions of possibility for the emergence of new subjects, truths, and systems.

Following this description it seems plausible to establish a connection between the concept of the event and the encounters with political violence experienced by Villa and Pedraza. In the first place, these encounters were ‘impossible’ –remember here the answer that Villa received from her mother right before the bomb exploded: “We are not that important.” Also, these experiences could be labelled as ‘real’ inasmuch as they completely escaped predictability and immediate meaning. And last, but not least, they forced Villa and Pedraza to accept new possibilities, producing, in the process, new subjectivities and truths. Badiou’s idea of the event is rather mutable and changeable,<sup>68</sup> hence these encounters may not meet all the requirements necessary to be considered as such. Nevertheless, if we take into account the brief explanation of the event provided above along with the description on the cases that opened this chapter it might yet be possible to consider the experiences of Villa and Pedraza as “eventful.”

The event as the resurgence of a –necessarily– excluded part that destabilises law and ideology reminds us of the structurally necessary –and yet conflictive– relation between law and contingency described in Chapter Two. So, what is the exact connection between event and contingency? What are their differences? Do they play the same role in the production of narratives of justice? What role is that?

In this regard, it may be possible to draw several similarities and differences between contingency and the event: (1) contingency is a property of the event; (2) every event is contingent, but not every contingency is an event; (3) contingency is disclosed and becomes visible in the event.

(1) Contingency is a property of the event. Even if Badiou has described the event sometimes as the ‘occurrence of the impossible’ it is important to remember that ‘the impossible’ refers, in this case, to that which cannot occur within ‘the

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<sup>68</sup> Although not exhaustive, some of the lists of events provided by Badiou seem rather arbitrary, ranging from deeply personal phenomena –such as falling in love– to more socio-political ones –such as the Haitian Revolution.

situation’ –that is, the Imaginary-Symbolic field of reality in contraposition to the field of the Real. Therefore, it would be unwise to declare that contingency and the event are incompatible due to the ‘impossible’ character of the latter. Quite the opposite, the event is ultimate and radical contingency: that which may happen beyond our wildest dreams, nightmares, and expectations. It is, in other words, but the actualisation of a raw, unlikely, and unforeseeable possibility.

In consequence, (2) every event is also contingent –it may or may not happen– but contingency exceeds the event itself. The latter always comes from beyond the wall of reality; contingency, on the other hand, operates on both sides of the wall: it includes the possibility of the return of the excluded part, but also all the different combinations and permutations of small and apparently irrelevant particularities that may take place within the situation.

And last, but not least, (3) the event discloses the radical contingency of our existence, making it visible. The event is ‘the unexpected’ knocking down the doors of our everydayness. It challenges our views, demanding a movement of distancing and de-distancing (Heidegger, [1927] 2010, 97) from our immediate reality. However, the effects of the event transcend the event itself: yes, the impossible has occurred...but that also means that other ‘impossibles’ may occur too! Hence the reason why I chose to use the expression ‘knocking down’ instead of saying that the event ‘opens the doors’ of our everydayness. After the event, these doors are simply gone, they no longer exist, and through that opening in the wall of reality it becomes possible to see a whole new world of possibilities: the event discloses, as Badiou notices, the possibility of the possibility. That is, contingency.

Ultimately, the event is but a contingent actualisation of contingency itself. The latter, nevertheless, remains as pure potentiality: where the event is “the unexpected,” contingency appears as “the possibility of the unexpected.” But even if the importance of contingency is revealed dramatically in the wake of the event, it does not necessarily require of the event itself for this.

### *From encounters to narratives*

In relation to the production of narratives of justice, contingency enters the scene in two steps. First, it becomes visible in the emergence of unexpected circumstances that lead us to seek justice in the law, hoping to restore ‘normality’ to our lives. And second, it can also manifest itself in a “dissatisfaction of normative expectations” (Renault, 2004, 107-108). This dissatisfaction can be restricted to the rupture of the normative expectations caused by the circumstances that led us to seek justice in the first place –thus reinforcing our positive appreciation of the law. But it can also go beyond these original circumstances –and encompass law itself– if we understand that ‘normality’ has not been restored:

While our routines are accompanied by implicit positive valuations of our social environments, the emergence of a feeling of injustice entails a shift to critical appreciation. [...] If the inquiry on the nature of the injustice concludes that it is produced by, or compatible with these [normative] principles, their positive appreciation turns into a critical one. (ibid, 111)

As stated above, law needs contingency in order to be enforced (back) into existence: it is its very condition of possibility. Without a rupture in normative expectations normality cannot be restored, and thus norms cannot be enforced. Without law-breaking and justice-seeking subjects law cannot act. But this necessity also entails a danger: if the law fails to meet the expectations that it has created, this situation could lead to a questioning of its very authority. It could become dispossessed of the ‘natural character’ with which it clothes itself, revealing its historic, political, and ultimately contingent character.

Therefore the role of contingency in the production of subjective understandings of justice is threefold. In the first place, contingency creates the conditions of possibility for the emergence of circumstances that entail a rupture in normality, leading to a direct contact between the subject and the law –along with a greater awareness of the impact of the latter on the life of the former. Secondly, this scenario allows the law to assert its authority. And, finally, the outcome of this legal and judicial process –in which law enforces its authority– will determine whether such authority is accepted or questioned depending on the satisfaction or dissatisfaction of the subject and his expectations with the decision made. The reach

and limitations of the law become apparent to the subject throughout this process. The possibility of the unexpected is disclosed, holding sway over the subject. And if, for whatever reasons, the expectations of the subject are not met, this process can also lead to a repositioning in his relation with the law and to the production of a new subjective understanding of justice.

This, of course, is intimately connected with the differences between demands and desires for justice already introduced in Chapter Two, and it might be interesting to see to what extent it would be possible to make a move in desire from *expectation* –Erwarten– to *anticipation* –Vorlaufen– (Heidegger, [1927] 2010).<sup>69</sup> For the time being, however, it is necessary to set this topic aside if we are to get a better grasp of the role and importance of contingency in the production of subjective narratives of justice.

The irruption of contingency in our everydayness requires us to take a step back, look, and reassess –or even change– our position in the symbolic milieu we normally inhabit. A possible but very unlikely explosion forced Irene Villa to rethink her own life, making relevant, overnight, topics such as justice and forgiveness that were completely irrelevant to her before. A similar incident turned a former shop assistant, Ángeles Pedraza, into the leader of one of the biggest political lobbies in Spain, championing the fight against a separatist group that had no relevance in her life before 2004. And, in the same way, the possible and yet unexpected irruption of the histories of these two women in this research requires us to reconsider the true role of contingency in the formation of subjective understandings of justice.

Ultimately, contingency produces an immediate feeling of alienation towards the law: in the process of becoming aware of its importance it also becomes alien to us. We start wondering if these legal norms are part of the solution or part of the problem. The possibility of the unexpected becomes problematic too. The recently disclosed strangeness of the law and our very lives causes an unbearable feeling of uneasiness. And, in this situation, re-integrating that breach into our symbolic network becomes a pressing necessity. That is, we must produce a narrative of

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<sup>69</sup> This topic appears studied in further detail in Chapter Five.



justice in order to abandon the apparently meaningless situation of discomfort we currently inhabit and regain a sense of purpose in life.

*Function of the creation of narratives*

Contingency, as a destabilising factor, appears as the problematic element demanding articulation in any narrative of justice. The increased awareness of its importance provoked by the unexpected circumstances in which our normative expectations are thwarted leads to a critical questioning. A critical questioning not just of the law, but also of all the symbolic constructions that rendered our lives safe, predictable, and stable. In other words, contingency challenges –and even dismantles– whatever narratives of life we may have had, and if the institutions meant to restore normality to our lives fail to fulfil their function, the production of a new narrative is required. A narrative meant to provide us with a renewed sense of purpose.

Expectations, plans, norms, systems, goals, laws...all of them are called into question by the experience of contingency. And it is this very experience that acts as the basic requirement for the production of new discourses or narratives of justice: “A universe of experience is the precondition for a universe of discourse” (Dewey, 1938, 68). In principle, any experience of contingency is “perceived as part of the environing world, not in and by itself” (ibid.), but the relation between such experience and the symbolic matrix that it enters –and, in which it is also perceived– is problematic. On the one hand, we try to make sense out of it by drawing connections between this new element and the pre-existing ones; but, on the other, this new element simply does not “fit in.” In the same manner that definitions emerge from “forms of life” and words result unintelligible without a grasp of the social background in which they are used (Wittgenstein, [1953] 1967), an isolated experience cannot be understood without the symbolic matrix in which it takes place.<sup>70</sup> Expanding on this linguistic metaphor, the problematic entailed by the irruption of contingency in our lives would be similar to that of being forced to use, in our everyday life, a foreign word that we have never heard of before. It would be the equivalent of forcing a Chinese peasant from the 13<sup>th</sup> century to use

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<sup>70</sup> See Wittgenstein’s famous example: “if a lion could talk, we could not understand him.” (ibid.)

words like “drone,” “psychoanalysis,” or “microprocessor” in his daily life. It would be virtually impossible for us to know how to use words like that in such a situation: we would have never heard them before; we would not know the context in which they are meant to be used; we would not know how to use them even if we had a basic understanding of such a context; and, ultimately, we would not know their meaning, what they stand for. Undoubtedly it would be possible for us to speak or utter those words, but we would not know how to use them –what to make out of them. They would simply not make sense in the symbolic matrix we had hitherto inhabited. In similar circumstances it might be possible to ask ‘a knowledgeable someone’ for the meaning and use of these new words, but that ‘authority’ could also be missing or simply fail to explain –and thus render understandable and normal– these questions.

A similar situation occurs when we have an encounter with contingency: it does not fit in with the symbolic structures that we have inhabited so far. New experiences, new events, new discoveries, new inventions...they require us to reshape our language and make room for them in our lives. When contingency becomes manifest in experiences such as those of Irene Villa and Ángeles Pedraza, the immediate reaction of the subject could be to appeal to ‘the competent authorities’ –that is, law– to confer meaning, explain, and adjust these newly apparent circumstances. The subject may seek answers and recognition in the authority of the law, but if the latter fails to meet such expectations, these circumstances would still require integration in the symbolic matrix regulating our everyday life. If this happened, there could either be a withdrawal of the subject – becoming overwhelmed by the apparent meaninglessness that an unexpected contingency has brought upon his life–<sup>71</sup> or a production of a new symbolic matrix capable of articulating the problematic element –contingency– in a narrative of justice in response to the inoperability of the law.

In relation to the main topic of this chapter, the most interesting aspect of these subjective narratives of justice is that they do not erase contingency. Quite the opposite, they are built on and around it: “The universe of experience surrounds and regulates the universe of discourse but never appears as such within the latter”

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<sup>71</sup> Discussed in the Interlude.

(Dewey, 1938, 68). Contingency appears as the symbolic void that originates these narratives, but also as the force keeping them together: as if it were a black hole whose gravitational pulse prevents any particle or electromagnetic radiation from escaping its event horizon. For that reason all the conferences given by Irene Villa and all the speeches made by Ángeles Pedraza over the last few years refer, in the end, to the encounters with political violence that changed their lives.

The production of subjective narratives of justice not only permits the analysis and interpretation of a situation previously unintelligible, but also –and this is the most important part for this research– the articulation of hitherto unthinkable claims for justice. The histories of Pedraza and Villa are good examples of this, but they also illustrate how this process is never completely finished: the goals and claims fostered by Pedraza in her narrative are either too distant in the future or simply unattainable; and, in the case of Villa, the constant return to the explosion that caused the loss of her legs seems to indicate that her discourse of forgiveness requires a permanent re-enactment and working-through without ever being fully completed. As Rorty well notices, in the end, every human life seems to be but “the working out of a sophisticated idiosyncratic fantasy, and [...] no such working out gets completed before death interrupts. It cannot get completed because there is nothing to complete, there is only a web of relations to be rewoven, a web which time lengthens every day” (1989, 42-43).

### **Narratives of justice: contingency between fate and character**

#### *Articulating contingency in the cases of Irene Villa and Ángeles Pedraza*

Forgiveness, punishment, reparation, suffering, redemption, peace, balance, sacrifice, victory...as seen in the cases of Villa and Pedraza, different narratives of justice present and articulate different elements. Narratives, that are also affected and conditioned by a variety of political, historical, economic, social, psychological, and cultural factors that determine the subjective position from which these narratives are produced. And yet, in spite of the many possible combinations of factors and discursive elements, all narratives of justice have something in common: they appear in response to the irruption of contingency in our lives and the failure of the law to restore normality and meaningfulness to it. In

other words, these narratives emerge as an attempt to repair the breach in the Symbolic and integrate contingency into it.

Irene Villa tried to make sense out of the loss of her legs, and Ángeles Pedraza tried to confer meaning on the loss of her daughter. They were trying to integrate the unexpected events that caused their suffering, but also the possibilities disclosed by such events. The irruption of contingency is not just a one-time thing: it also reveals the possibility of other unexpected things happening. It can shatter our plans of life and dismantle our normative expectations, opening a future of uncertainty sometimes difficult to bear. And, in response to this situation, if law fails to restore normality, the subject might create a narrative of justice capable of conferring meaning on contingency, on the unexpected and the possibility of the unexpected.

Creating a narrative is, in a way, like creating a story. A story we tell ourselves about ourselves, about our lives. And, ultimately, a story in which each of us is the main character of our own narrative. Before the explosion that caused the loss of her legs, Irene Villa was a girl who attended school and dreamed of playing basketball and becoming a model someday. In the same way, prior to the 2004 bombings Ángeles Pedraza had a stable job, and having two grown-up children she dreamed of becoming a grandmother soon. Both subjects had their own stories, their own narratives of life. Knowing where they came from, and, supposing that their circumstances remained relatively stable and unchanged, they also knew where they could and would like to see themselves in the future. The knowledge of their past and present circumstances allowed them to navigate through a process of becoming, towards the situation in which they would like to find themselves someday. This relation between past experiences, present circumstances, and expectations about the future allowed them to make sense out of the world surrounding them, making it part of their story.

Ceteris paribus, if nothing extraordinary or unexpected happens, we might be able to see these kinds of narratives of life become true. The problem is that, as seen in the cases of Villa and Pedraza, the unexpected is always possible. And, as it happened to them, it can tear to pieces whatever narrative we might have had. The symbolic puzzle of our life, once considered stable and maybe even natural, is undone by the irruption of contingency: its pieces now scattered, disperse,

unconnected, meaningless in and by themselves. In such circumstances it might yet be possible to go to law, to its authority, hoping that the legal norms meant to provide us with stability and certainty might also be able to restore normality to our lives. Hoping that the law might be capable of putting the pieces back together. Hoping, in the end, that it might be able to help us confer meaning on an apparently meaningless situation. And, if possible, assure us that our expectations in life will not be dismantled again. That is, that no such contingencies will disturb our plans ever again.

If the subject perceives law as incapable of doing this –or maybe even as part of the problem, and not just as an unsatisfactory solution– the need to restore meaning to our lives and articulate contingency remains. And in these cases, in the wake of the failure of the law, the subject will produce a narrative of justice. Just like the angel of history (Benjamin, ([1940] 1970)), the subject sees the wreckage left behind by the irruption of the unexpected in his life. What used to be a chain of events is now a single catastrophe. We might like to “stay, awaken the dead, and make whole what has been smashed” (ibid.), but all that is left for us to do is to move on, collect whatever pieces of the wreckage we can, and try to put them together...not in the way things really were, but reappropriating them in a new light: interpreting our lives in a new way.

It was said before that knowing our past and our present circumstances allows us to navigate towards our expectations in a process of becoming. The need to create a new narrative forces us to reconfigure these elements, allowing us to locate and know again “the causes of being what we are” (Rorty, 1989, 27). We start a process meant to retrieve the coordinates of our lives, and thus regain self-knowledge. But this process becomes, in the end, a process of self-creation. Recovering and re-articulating our past experiences, “the causes of our being what we are,” is not to recognise things “as they really were,” but to reappropriate them: to transform and see them in a new light.

In the narrative of justice produced by Pedraza, the loss of Myriam is no longer –just– the loss of her daughter and the mother of her future grandchildren, but –also– the cause, the driving force, in her struggle against ETA. She became a sacrifice in the struggle for a greater good. And, in the narrative produced by Villa,

the loss of her legs is no longer –just– the incident that thwarted her youthful dreams, but –also– the event that made her be born again. And just like being born, the loss of her legs became in her narrative an irrational and contingent originary moment that, rather than dismantling plans and expectations in life, allows the emergence of new ones.

The creation of these new narratives not only entailed the production and appearance of new stories of life for Villa and Pedraza, but also transformed the main character in each of these stories. On the one hand, Pedraza ceased being a regular shop-assistant who hoped to be a grandmother someday, becoming the embodiment of a relentless police-based struggle against ETA, and the leader of one of the most important lobbies in Spanish politics. On the other, Villa stopped being an anonymous child, and was transformed into the living testimony of the overcoming of physical and psychological difficulties, sharing her experiences with others.

Narrative and subject are transformed in both cases, and the need to articulate and confer meaning to contingency acts as the driving force operating these changes. But how exactly do they articulate contingency? How does this new articulation transform their relation with the law? Do they just replace one –legal– justice for another? Do they try to rule contingency out of their lives once again, or do they accommodate it within their narratives in some other way?

#### *Law-making narratives*

Even if contingency appears as the problematic element requiring articulation in any narrative of justice, not all narratives articulate it in the same way. In some cases, like Villa's, it might appear as a meaningless and unfathomable 'impossibility'<sup>72</sup> that allows the emergence of all other possibilities in life. In others, like Pedraza's, it might be seen as a meaningful event, as a sacrifice for a greater good. As said above, the configuration of the narrative produced by the subject is dependent on the constellation of factors surrounding it, and the way in which it is articulated: its structure. But even if factors such as political and historical context or the economic and social background of the subject have an

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<sup>72</sup> The event, in Badiou's terms.

effect on the overall process, what matters the most here is understanding the role played by contingency in the structure of the new narrative, and how that affects and transforms, in turn, the subject's understanding of justice in relation to the law.

Making use of the concepts of “fate” and “character” in the work of Walter Benjamin ([1919] 1978) and Rafael Sánchez Ferlosio (2011), in this section I will analyse the articulation of contingency in the narratives produced by Ángeles Pedraza and Irene Villa, considering three different –although interconnected– dimensions in each of them: the role played by contingency and the way in which they articulate it, the similarities between this articulation and that of law, and the way in which their articulation of contingency results in the production of a new understanding of justice that transforms their relation with the law.

The key concept to understand the articulation of contingency in Pedraza's narrative is sacrifice. As seen at the beginning of this chapter, it is easy to find direct and indirect references to this idea in most of her public statements: “our immense sacrifice was worth it, we won. And they, those murderers have lost;”<sup>73</sup> “the victims have already been too generous;”<sup>74</sup> “public authorities and tribunals alike should be up to the sacrifices that they [the victims] have made,”<sup>75</sup> etc. The presence of this discursive element along with others such as memory, victory, defeat, or cause is indicative of the way in which Pedraza frames the irruption of contingency in her life. The real and symbolic loss of her daughter, along with the losses of other victims, is presented in her narrative as a form of “sacrifice.” Or, in other words, as a “meaningful loss” (Agamben, 1998). A loss that appears meaningful inasmuch as it has a cause and a goal: insofar as it belongs to the sphere of fate.

Sánchez Ferlosio<sup>76</sup> clarifies this connection between contingency, sacrifice, meaning, and fate using the following Spanish saying:

El potro que ha de ir a la guerra, ni lo come el lobo ni lo aborta la yegua (2011, 57).

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<sup>73</sup> See page 116.

<sup>74</sup> See page 118.

<sup>75</sup> See page 118.

<sup>76</sup> Rafael Sánchez Ferlosio (1927) is a Spanish writer whose philosophical work, with the exception of *Carácter y Destino* is marked by the use of aphorisms or ‘pecios’ (shipwrecks), as he likes to call them.

An approximate translation of this saying into English would be “the foal meant to go to war, is not eaten by the wolf nor miscarried by the mare.” Surviving the attacks of the wolves, not being miscarried...in a narrative structure of fate, when the foal is *meant* to go to war, when it is *fated* to go to war, these facts are not just felicitous coincidences nor contingencies. They appear as necessary inasmuch as they have a higher cause that makes them meaningful, a purpose that is their *raison d’être*. According to Sánchez Ferlosio, this is but “the perverse voice of fate, [...] the twisted irrationality that attempts to rationalise contingency, imposing meaning, cause, or argument on it” (ibid.)<sup>77</sup>

In the sphere of fate, contingency is subdued to necessity: rationalised and rendered *meaningful*. And, at this point, the connection between contingency, fate, meaning, and sacrifice becomes clear. A foal *meant* to go to war is *fated* to go to war. The *meaning* of its life lies in its *fate*, and everything else that may or may not happen to it in the process is read and becomes meaningful in the light of such fate. There is no space for contingency or coincidence in this sphere. Everything that happens is but an excuse for the unravelling of fate: for the development of the story, the argument, and the cause that it represents. In fate, contingency is always overwritten by meaning, and life, sacrificed for the sake of history.<sup>78</sup>

Pedraza’s opposition to the permanent ceasefire declared by ETA in 2011 and the repeal of the Parot Doctrine by the ECHR in 2013 responds to this logic. She wants her sacrifice to be “worth it”, not to be in vain. In the same manner that the foal survived the attacks of the wolves and was not miscarried because it had to go to war, ETA must be defeated because Myriam *had* to die. It is the fight against ETA, the struggle to defeat it, which confers meaning on the loss of Myriam in Pedraza’s narrative of justice. If there is no war to go to, there is no reason for the foal to have survived; and, if there is no ETA to be defeated, there was no reason for Myriam to die. The production of a narrative meant to restore meaning to Pedraza’s life articulated the coincidental death of Myriam in March 2004 as a painful necessity, as something that was required for, and in turn required, the total

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<sup>77</sup> His work has not been translated into English yet. All the references to his work here are my translation.

<sup>78</sup> The implications of *fate* in terms of temporality will be discussed in further detail in the Interlude.



and complete defeat of ETA. Without a higher cause –without a fate– capable of rendering meaningful the loss of her daughter, the irruption of contingency that once destabilised Pedraza’s symbolic universe threatens to enter her life and destroy her narrative once again.<sup>79</sup>

Along with other factors, the political and historical context surrounding the 2004 bombings can be seen as one of the causes for Pedraza’s creation of a narrative structure of fate. Between 1991 –when Villa lost her legs– and 2004 there were at least three events that marked a turning point in the social perception of ETA, its actions, and its victims: the failed attack on the conservative leader José María Aznar, the kidnapping of José Antonio Ortega Lara, and the kidnapping and execution of Miguel Ángel Blanco.

The first of these events is the attempted murder of the conservative leader José María Aznar in 1995, and the subsequent victory of his party in the 1996 elections. An event whose importance cannot be understood without a basic knowledge of the historical background of Aznar’s People’s Party (PP). Created at first as ‘Alianza Popular’ (AP), this party is heir to Francoist politics, and in consequence its ideology is largely characterised by Spanish nationalism, an inherited inclination towards greater levels of political centralisation, and a considerable dislike for ‘peripheral nationalisms.’ The transition to democracy did not entail a rupture with the previous political system, but an internally driven mutation. So even if this party departed from a relatively solid institutional position, their links to the previous regime came at a price in terms of legitimacy. Spanish nationalism had become essentially reactionary under Franco’s Dictatorship, constructed in clear opposition to Basque and Catalan nationalism, and communism. And, as a consequence of the repression (50,000 to 200,000 casualties) during and after the Civil War (1936-1939), Spanish nationalism became largely discredited due to its links to Franco’s Regime. In many aspects the transition to democracy represented a “pact of forgetting” that implied that the new democratic regime would not point fingers at former members of the dictatorship or delve into the past in order to bring to the political arena a debate on the victims of the repression. However, and in spite of their lack of visibility, these victims and the links of the People’s Party to Spanish

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<sup>79</sup> Whether such attachment is completely conscious or not is open to debate. However, its unconscious component, discussed at length in Chapter Four, cannot be easily dismissed.

nationalism kept haunting the politics of the Spanish right wing for years, undermining its democratic legitimacy.

This situation changed in 1995, when Aznar survived the detonation of a bomb placed by ETA under his armoured car. For two decades, the “pact of forgetting” had prevented political parties from using the victims for electoral gain, but this attack on Aznar offered the conservatives a new opportunity. The socialist government of Felipe González (1982-1996) was already severely weakened by the dirty war against ETA, economic turmoil, high levels of unemployment, and the emergence of several cases of political corruption. The attack on Aznar allowed the conservatives to strengthen their discourse against ETA. But, most importantly, it allowed them to create an emotional tie between them and the victims. From that moment on they were able to identify any attack on the victims as an attack on the state, and any attack on the state as an attack on the victims. Having suffered an attack himself, Aznar and his party managed to become the champions of the victims in the conflict against ETA. They had found victims “of their own” that provided them with the democratic legitimacy that they lacked as political heirs of Francoist politics. The victims of ETA became a relevant political actor thereby, attaining levels of visibility that they previously lacked.

The second turning point in the evolution of the social perception of ETA between 1991 and 2004 was the kidnapping of José Antonio Ortega Lara in 1996. Prison officer and member of the People’s Party since 1987, Ortega Lara was abducted by ETA and kept in a dungeon 3 meters long by 2.5 wide and 1.8 high with no windows for 532 days. In exchange for his release, ETA demanded the transfer of prisoners to Basque prisons –something that first González and then Aznar refused to accept. Eventually Ortega Lara was found and rescued by the police, but in the meantime his kidnapping had become a symbol for the PP’s struggle against ETA, making him, de facto, a political martyr.

Ortega Lara’s kidnapping accelerated the process started by Aznar two years before. However, it was a different event that helped the conservatives change the social views on ETA and its victims for good.

The third and last event was the kidnapping and execution of Miguel Ángel Blanco on the 10<sup>th</sup> of July 1997. Recently elected as councilman for the small town

of Ermua –in the Basque Country– Blanco had been a member of the People’s Party since 1995. In view of the poor results rendered by the kidnapping of Ortega Lara, ETA decided to force the Spanish Government to negotiate the transfer of prisoners threatening to kill Blanco within 48 hours if they did not agree to do so. There were mass demonstrations in all major cities of Spain hours before the ultimatum. And fifty minutes after the deadline, and in view of the reluctance of the Spanish Government to accept its terms, ETA decided to execute Blanco. He was shot on the back of the head and found on the brink of death on the outskirts of San Sebastián. He died in the hospital overnight.

The action against Miguel Ángel Blanco was meant to send a clear and strong message. Namely, that they were serious about their demands and threats, and that they would not hesitate to carry them out. However, the results of their actions were not the ones they expected. The process started by Aznar in 1995 had polarised the public opinion against ETA, and a clear sense of open rejection to its actions had become widespread. Blanco was a politically irrelevant target, and, in the end, his execution was perceived as an act of unnecessary cruelty. Public opinion rallied against ETA, and the victims gained visibility, mass support (the demonstrations that took place all over Spain hours before the execution), a champion of their cause as Prime Minister (Aznar), survivors that could narrate the cruelty of their enemy (Ortega Lara), and a true martyr (Blanco) who was targeted simply because he was a member of a non-separatist party.

From that moment on, the associations of victims of ETA –especially the AVT– became true political lobbies with a greater saying in criminal law and criminal policy, capable of shaping the approach of different governments to the Basque conflict. Since the execution of Blanco, the victims of ETA were politically enshrined as martyrs of freedom and democracy in the struggle of the state against this group. Whoever did not offer them their total and complete support or did not agree with their claims became suspected of supporting ETA, and the two major parties in Spanish politics competed against one another to see who had greater support from the victims, something that became even more evident in the wake of the 2004 bombings.

The political context surrounding the death of Myriam was one of the factors that allowed Pedraza to embrace –and reshape– a narrative capable of conferring meaning on the loss of her daughter. A narrative in which her death would not be a simple and plain contingency, a tragic coincidence, but a meaningful loss: a sacrifice for a higher cause. A higher cause, the defeat of ETA, in which the Popular Party successfully equated the interests of the state with the interests of the victims. Ultimately, Pedraza was able to embrace a narrative structure in which the promise of the future defeat of ETA would make her suffering meaningful. A narrative in which:

moments, instants, they do not belong to themselves anymore, they are imbedded in a vector of sense; it is a tense moment, violently stretched, in which every instant is out of itself, a function of the following and preceding ones (Sánchez Ferlosio, 2011, 56).

Just like in the case of Hamlet, in Pedraza's narrative 'time is out of joint,' her present life torn apart between the past and the future: between a sacrifice that demands to be "worth it," and a fate that carries within itself the promise of doing so. Time is out of joint, and she lives 'to set it right.' Her narrative is imbedded in a sphere of fate, in which:

[Time] is not an autonomous time, but is parasitically dependent on the time of a higher, less natural life. It has no present, for fateful moments exist only in bad novels, and past and future it knows only in curious variations (Benjamin, [1919] 1978, 308).

This fateful and sacrificial approach to contingency in Pedraza's narrative also produces a subjective understanding of justice deeply marked by the temporality of fate. Her dissatisfaction with the shortcomings of legal justice, along with her view of Myriam's death as a sacrifice, results in the production of a fateful and nearly-messianic understanding of justice: attaining it requires the complete and total disappearance of ETA. A disappearance that is eternally postponed, always displaced onto the future, but at the same time required by the past, by the sacrifice of her daughter. And it is in this particular respect, in a temporality in permanent tension between past and future but blind to the present, that the articulation of contingency in Pedraza's narrative of justice mirrors that of the law.

The temporality of law, according to the preliminary explanation already provided in Chapter Two and studied in more detail in Chapter Five, is primordially

chronological. It is marked by sequentiality. Laws are passed on the basis of past experiences, meant to rule future behaviours, but blind to the present. In its temporality, time is reduced to a succession of moments in which the present always appears as the future of a past, and as the actualisation of a near future: a missed encounter between a “not yet” and a “too late” in which each moment does not belong to itself anymore. In the law, the present is always a function of the past and the future, out of joint. But what is even more interesting, and also points towards the similarities between the articulation of contingency in both law and Pedraza’s narrative of justice, is that, according to Benjamin, the order of fate belongs to the sphere of law (ibid., 307): to the sphere of guilt, judgement, punishment and reward. Elements that are also present in Pedraza’s narrative.<sup>80</sup>

Law condemns, not to punishment but to guilt. Fate is the guilt context of the living. [...] Therefore it is not really man who has a fate; rather, the subject of fate is indeterminable. The judge can perceive fate wherever he pleases; with every judgement he must blindly dictate fate. It is never man but only the life in him that it strikes –the part involved in natural guilt and misfortune by virtue of illusion (ibid., 308).

In the same manner that law imposes meaning on contingency, and in the same way in which every case becomes an excuse to enforce law back into existence, in a narrative of justice underpinned by fate every contingency is reduced to a function of the higher cause: including the death of Myriam, whose loss becomes sacrifice. Ultimately, even if Pedraza’s understanding of justice seems to confront and contradict the current state of legal justice, challenging the decisions made by institutions such as the Spanish Supreme Court or the ECHR, it does not differ so much from it. Instead of presenting an understanding of justice opposed to the rule of law, she seems to want to inscribe her own pain and her own view of justice in the law (Brown, 1995, 66). In other words, hers is a law-making narrative of justice.

Pedraza’s opposition to a negotiated end of ETA can be seen as a dissatisfaction with the shortcomings of law and politics, and also as an attempt to inscribe her own narrative, her own fate, in the law. With the declaration of the permanent ceasefire in 2011 the process of identification between the interests of the victims and the interests of the state is revealed as something ideologically constructed for

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<sup>80</sup> See pages 116 and 118.

political and electoral gain, giving birth to a new political context. In this new scenario, the state and the different political parties lose their guise of universality (ibid.,57) and legal justice is revealed as flawed, unable to restore, repair, and satisfy the normative expectations of the victims (Renault, 2004, 104): a situation that Pedraza hopes to remedy by changing the law, by making a new law that would mirror her narrative and her pain, hence ensuring the survival of the fate that has conferred meaning to her loss, making it, in the end, a sacrifice.

*Law-destroying narratives?*

In contrast with this view, the narrative produced by Irene Villa provides us with an entirely different approach to contingency, in which fate loses importance. The concept of sacrifice becomes irrelevant, and instead we find others such as forgiveness, opportunity, self-overcoming, responsibility, or happiness. Finding meaning in life is also a pressing necessity for her, probably even more clearly than in the case of Pedraza –as exemplified by the first question that she asked her mother after the explosion: “why did this happen to us?” And yet, in spite of the importance of the aforementioned concepts, none of them seem to occupy the central role played by sacrifice in Pedraza’s narrative.

Instead of formulating clear demands for justice or requiring the authorities to be up to the sacrifices made by the victims, what we find in Villa’s narrative is a constant return to the irruption of contingency in her life. A constant return to a moment that, ultimately, appears as a true point of departure for her. When the case of Villa was introduced at the beginning of this chapter, there were two aspects of her narrative that seemed to contradict one another: her rejection of the label of ‘victim,’ and the constant return to the loss of her legs in her conferences and interviews. On the one hand, she has repeatedly refused to be considered a victim.<sup>81</sup> On the other, the value of her defence of forgiveness can only be understood insofar as she is seen as a victim of political violence. And yet, as I will argue, this contradiction becomes merely superficial once we take into account what is at stake here: the articulation of contingency. Or, in other words, the articulation of the explosion in which Villa lost her legs.

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<sup>81</sup> See pages 107 and 108.

When Pedraza lost her daughter in 2004 there was a whole public narrative that allowed the victims to identify their interests with those of the state. But even if the attack suffered by Villa and her mother received widespread media coverage, the situation in 1991 was entirely different. At that time, before the attack on José María Aznar and the kidnappings of José Antonio Ortega Lara and Miguel Ángel Blanco, the victims of ETA were merely seen, we could say, as people who had been struck by lightning. Something awful had happened to them, but there was no wider social narrative capable of conferring meaning to their suffering. The “pact of forgetting” was still very much in force, and they were not politically constituted as victims yet. And in this context, in the wake of the destruction of her normative expectations in life, Villa asked for advice from the only person that she thought was able to understand her, to the only person who had been co-witness to her suffering: her mother.

My child, we can cry just like you’re doing now. We can curse and blame these people...we have every right to do so. But that would make us very unhappy. Hatred only causes pain to the person who feels it, and it wouldn’t hurt them...not in the slightest. But we have another option: forgiving. We can think that we have been born like this [...] and do everything we can to be happy.

That shared experience with another is something missing in Pedraza’s production,<sup>82</sup> and as a result she had to go to law, as the only lasting authority capable of making her suffering meaningful. In the absence of a political narrative capable of restoring meaning to their lives, Villa and her mother had to create their own. A narrative that, instead of inscribing contingency in the order of fate, could inscribe it in the order of *character*. Villa took her mother’s advice literally and decided that they had been born again that day. For her, the day of the explosion is not the day in which her previous narrative of life was destroyed, hence constituting her as a victim in a new narrative that could supplement a purportedly flawed legal justice. For her, that is the day when her life truly began. And, therefore, the constant return to that moment in her public talks is not in contradiction with her

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<sup>82</sup> Nearly 200 people died in the 2004 bombings, and thousands were injured. But, in contrast with Villa and her mother, Pedraza was not there. For her, the irruption of contingency was not marked by the explosion itself but by the loss of Myriam. Something that she had to deal with in solitude, without witnesses that could understand her suffering until she became a member of the AVT.

rejection of the label of victim. Quite the opposite, it can be seen as a way of publicly saying that she never was a victim to begin with: she had simply been born like this.

Completely dissociating herself from her previous life –reaching the point of celebrating her birthday on the anniversary of the explosion, and admitting that she does not recognise herself in the pictures of that day– for Villa, the loss of her legs has become something similar to being born: a purely contingent event with no cause or reason, the ‘impossibility’ that allows the emergence of all other possibilities.

Hence, returning to that particular moment in her public talks is not a way of presenting herself as a victim, but a way of presenting *her-self* as she has been since she was born again in 1991. The constant return to the experience of losing her legs is, in the end, the recurrence of Irene Villa qua subject. Or, using Walter Benjamin’s terminology, the recurrence of her *character*:

When Nietzsche says, “If a man has character, he has an experience that constantly recurs.” That means: if a man has character his fate is essentially constant. Admittedly, it also means: he has no fate –a conclusion drawn by the Stoics ([1919] 1978, 306).

As happens in *A Critique of Violence* ([1921] 1996), where Benjamin opposes religion to myth, and divine violence to mythic violence, in *Fate and Character* he opposes these two terms. Fate is seen in tragedy, where the different parts are overdetermined by the overarching story that they are meant to enact and tell, as is the case with Hamlet; it imposes meaning on contingency, sacrificing it for the sake of purpose and history; and, in the end, belongs to the sphere of law and guilt. Character, on the other hand, is most clearly seen in comedy, like Don Quijote,<sup>83</sup> where the story itself is but an excuse for the different personas to display their own unique traits. It does not superimpose meaning on contingency. Quite the contrary, the irruption of each new contingency becomes the perfect scenario for the

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<sup>83</sup> Benjamin refers in his work to Moliere’s characters, but as Sánchez Ferlosio states in his study of these concepts, Don Quijote might well be the most paradoxical and yet clearest example of character in literature. As he says, “the essence of Don Quijote is being a protagonist whose character precisely consists in wanting to be a character of fate. [...] It is not, in any way, a hybridisation of both orders. Being a character of fate is the product of his own character; and that is why, instead of diminishing his condition of protagonist of character, this asserts and reinforces it.” (2011, 62-63)



unfolding of character. And, unlike fate –which belongs to the sphere of law, guilt and history– the order of character is inscribed in the sphere of life and innocence: in it, there is nothing to ‘set right.’

Villa’s narrative articulates contingency in the order of character. The loss of her legs along with any chance of speaking in public have become opportunities for the display of her character, for the display of the discourse of forgiveness and self-overcoming with which she has come to identify herself:

Character is unfolded in them like a sun, in the brilliance of its single trait, which allows no other to remain visible in its proximity. [...] While fate unfolds the immense complexity of the guilty person, the complications and bonds of his guilt, character gives this mystical enslavement of the person to the guilt context the answer of the genius. Complication becomes simplicity, fate freedom. [...] The character trait is therefore not the knot in the net. It is the sun of individuality in the colourless (anonymous) sky of man, which casts the shadow of the comic action (Benjamin, [1919] 1978, 310-311).

As discussed above, when Villa and her mother had to create a narrative capable of restoring meaning to their lives there was not such a thing as an overarching political discourse capable of doing that. Eventually Villa would become a visible member of the AVT, but she abandoned it in 2007, precisely when the ideological identification between the interests of the state and the interests of the victims in the fight against ETA was at its peak. What is most remarkable about this fact is its connection with Benjamin’s description of character as being unfolded like a sun that, in the brilliance of its unique trait, allows no other to remain visible in its proximity. It was precisely when a political narrative of fate tried to superimpose meaning on Villa’s story that she decided to reject the label of victim and terminate her association with the AVT. Her character would not allow any other trait, any other meaning, to be visible in its proximity.

The relation between tragedy and comedy also forms part of Benjamin’s distinction between the orders of fate and character, but even if it does not appear as a key element in this study of the articulation of contingency, it still allows us to perceive the form in which the narratives of Pedraza and Villa are respectively marked by fate and character. The constant recourse to the *reductio ad ETA* by Spanish politicians to mock and even criminalise their critics has generated a trivialisation of this topic. A trivialisation that eventually has turned ETA and its

victims into objects of amusement and even jokes. As leader of the AVT, Pedraza has criminalised this kind of behaviour from her twitter account. But what is truly significant in this respect is that Villa has adopted a completely opposite approach to this issue. Ángeles Pedraza has not been an object of jokes herself, but the “Irene Villa jokes” have become genuine genre in Spanish humour: the equivalent to the “Helen Keller jokes” in English. And yet, instead of criminalising and censoring this sort of behaviour as morally wrong, Villa has admitted to be surprised by the ingenuity and wit of people, even saying that her favourite joke is the one about her as “the explosive woman.”

Fate, as Benjamin puts it, belongs to the sphere of law, guilt, and tragedy; and character to the sphere of innocence, life, and comedy. The fact that Villa’s narrative is inscribed in the order of comedy would, therefore, dissuade us from trying to find any similarities between her articulation of contingency and that of law. But it still plays a major role in both of them. In the case of fate, in the case of law’s articulation of contingency, the subject –the character– is but an excuse for history: an excuse for the unfolding of meaning, argument, and causality. In the case of character, on the other hand, it is exactly the opposite: history itself becomes an excuse for the display of the individuality of the subject and his unique traits. There is a need for repetition in both of them, and yet this repetition changes from one to the other. On the one hand, law needs to be enforced back into existence periodically, and for that purpose it still has to be challenged by intermittent interruptions of contingency. But in the case of Villa it is her character that demands “an experience that constantly recurs.” The role of contingency in both articulations, even if necessary, is completely different in each of them. The goal of law is to reassert its authority, and in consequence it superimposes that meaning – fate, guilt– on any contingency. Character, on the contrary, always requires the recurrence of the same experience: the return of contingency itself over and over again in order to unfold its unique trait.

Unlike Pedraza, who aims to inscribe her own suffering and understanding of justice in the law, Villa develops an entirely different relation to it through her narrative. For her, justice is not a fateful and quasi-messianic ideal whose attainment is awaiting for us in the future. In her narrative, the present is not a space of suffering that we must forcibly transit in the journey between a necessarily

painful past and a future in which the wicked will be punished and the just will prevail. Quite the contrary, her narrative of character challenges that kind of temporality. As if a messianic time had actually befallen her, Villa's articulation of contingency in the order of character is translated into a permanent and recurring experience of the same in every moment, in every instant, in every contingency. Unlike law and fate, which are constantly torn apart between the past and the future, and in turn remain blind to the present, a narrative underpinned by character produces a kind of temporality in which every past, present, and future are constant, and every 'it was' is recreated into a 'thus I willed it' (Brown, 1995, 72-75).

Ultimately Villa's relation with the law is transformed by her narrative into a case of extreme sublimation, and redemption. Extreme sublimation insofar as the references to justice in her narrative tend to reduce it to legal justice, with no further desires for it after the demand has been satisfied and the corresponding legal punishment has been inflicted. And redemption insofar as, for her, justice is not something to be attained in the future: it is something that has already befallen her. The fact that she could still *be* after the explosion, the fact that that day she was born again, the fact that she *just-is*, is justice. Her narrative does not seek to be inscribed in the law or to transform it. Nor does it destroy law. But, in a certain way, the understanding of justice resulting from this narrative manages to suspend the law through its plain acceptance of it.

### **Conclusion**

Introducing the cases of Ángeles Pedraza and Irene Villa, this chapter has sought to illustrate and study the kind of circumstances that may prompt the subject to start talking about justice. For that purpose, it centred its attention on the role of contingency in the functioning of the law as well as on its destabilising role in the life of the subject. In the first place, it argued that contingency appears as the basic condition of possibility for the enforcement of legal norms, and hence as that which can guarantee the continued existence of law itself. However, the application of legal norms permitted by contingency presents some problems due to the reasons that may move a subject to seek help from the law: to seek justice in it. The occurrence of unexpected and potentially disturbing events in the life of the subject—the irruption of contingency in his life—has the potential to dismantle the symbolic

universe that had hitherto allowed him to navigate and make sense of the world surrounding him. Not only due to the direct effects such events may have on the life of the subject, but also because their occurrence implies that other equally unexpected and dangerous events may follow.

As a result of the uncertainty engendered by such contingencies the subject may find himself in the need of restoring a minimum degree of stability and normality to his life. For that reason, he may feel tempted to turn to the norms that so far had regulated his life. Hoping to make sense of his current situation and willing to put together the pieces of his symbolic universe, the subject may turn to the authority of the law. He may ask the law to articulate the contingency that changed his life in the first place: he may ask it to recognise his particularity of experience and fix the wreckage left behind by contingency.

However, the articulation of contingency that the law may provide in this regard is far from satisfactory from the point of view of the subject. As stated above, contingency itself is but an excuse for the law to reinforce its authority and, in consequence, all contingencies are treated indistinctly. The particularity of experience and the suffering undergone by the subject are left largely unrecognised. Due to the incapability of the law to provide the subject with that which he seeks and the sense of disappointment that may follow it, the subject may start developing a narrative meant to overcome this obstacle: a narrative capable of articulating contingency and restoring meaning to his life.

The study of such narratives conducted in the last part of this chapter discussed the way in which the use of different narrative structures may result in the emergence of radically different understandings of justice. Considering the similarities and differences between the cases of Pedraza and Villa, this discussion argued that the abovementioned narrative structures may oscillate between the Benjaminian notions of *fate* and *character*: between a quasi-messianic understanding of justice that subdues contingency to the unfolding of history and the attainment of a higher goal –as in the case of Pedraza– and a more subject-oriented understanding of justice in which history itself and the succession of contingencies in the life of the subject become but an excuse for the display of the unique traits of his character –as in the case of Villa.

## CHAPTER FOUR

### Desires for Justice, Just Enjoyment

May not the absolute and perfect eternal happiness be an eternal hope, which would die if it were realized? Is it possible to be happy without hope? And there is no place for hope once possession has been realized, for hope, desire, is killed by possession.

(Miguel de Unamuno, *The Tragic Sense of Life in Men and Nations*)

#### **Contingency and the dual role of the law**

Not all contingencies are the same. Some of them may appear as unexpected obstacles or nuisances requiring us to readjust our daily routines. And yet, this is all that these contingencies may require: a small effort, a slight change, or a minor adjustment. Other contingencies, however, are not so easily overcome and may have deeper effects on our lives. Contingencies such as those experienced by Irene Villa and Ángeles Pedraza have the potential to completely disrupt, call into question, and even dismantle our entire symbolic universe.

Not unexpectedly, this research project centres its attention on the second of these two types; the main reason being the state of helplessness and disorientation that follows them. In the event of a contingency belonging to the first kind –e.g. missing a train– and in spite of the troubles that it may cause, the symbolic structures underpinning our lives and rendering them meaningful remain largely untouched. Such symbolic structures may have ‘failed to foresee’ the possibility that something like that may actually happen...but they still allow us to navigate

the new situation we find ourselves in. The second type considered here also shares this ‘unexpected’ character; however, what makes it truly relevant in the context of this research is that, to a certain degree, this type of contingency forces the subject to seek help. When the organising principle underpinning the narrative of a subject is shattered by the irruption of this type of contingency, when that which conferred meaning to life disappears, the structures that allowed the subject to overcome other obstacles simply stop functioning: the symbolic universe is put ‘out of joint,’ leaving the subject unable to manage –or even understand– the new situation. They leave the subject in a state of helplessness that is perfectly crystallised in the first question asked by Irene Villa to her mother after the explosion: “Why did this happen to us?”

With the abovementioned symbolic structures in tatters, the subject may find himself unable to comprehend the obstacles that he now faces. Built upon the premises of a symbolic universe that no longer exists, even his identity and sense of self may have been blurred by the irruption of contingency in his life. The gap between his previous life and his new circumstances may throw the subject out of joint. Under such conditions it is understandable that the subject may seek to restore normality to his life: to preserve and rebuild the structures that had hitherto helped him make sense of it. He may turn, then, to the authorities that had so far held such structures together: to the guardians of a normality that threatens to slip away if nothing is done to preserve it. In other words, and in view of his own inability to make sense of the circumstances derived from the irruption of contingency in his life, the subject may ask an external authority to provide him with the meaning and recognition that he needs in order to carry on with his life as it used to be. In the case of Irene Villa, the first and most visible embodiment of such authority was her mother: not only a primordial figure of authority –being 12, as she was when she woke up in the hospital– but also someone that, given their shared experiences, could understand what she was going through.

In other cases –cases in which no one has gone through the exact same experience as the subject or the latter is already an adult– it might be difficult to find such an immediate figure of authority, but the subject’s need for recognition still presses him to find it. And, under such circumstances the subject may turn, instead, to the law.

The reasons why the law may appear as the ultimate safeguard of normality, as *the* authority capable of providing the subject with the kind of meaning and recognition he seeks is something that will be discussed at length in this chapter. For the time being, however, it is important to note that law plays a twofold role in this regard. On the one hand, it stands as a space in which the subject may be recognised as a valid interlocutor capable of “acting out” the experiences lived as a result of the abovementioned contingencies. On the other, it also acts as an external authority –supposedly– capable of recognising the particularity of experience of the subject –along with the demands for justice around which his symbolic universe could be rebuilt. And it is precisely this gap between both aspects of the law –as space and authority of recognition– that will act as a point of departure for the study of the emergence of desires for justice. Desires that stem, as I will argue, from the unbridgeable gap between the ideological functioning of the law and its actual enforcement.

*Space of recognition, authority of recognition: enforcement and ideology*

The first two chapters of this thesis presented some traces of this distinction, discussing at length the views of four different schools of legal thought. Each of them gave primacy to a different kind of judgement in the study of the relation between law, justice, and subjectivity. Natural Law promoted an external judgement of morality based on the accordance between positive law and morality/religion. Legal Positivism, on the other hand, favoured an internal judgement of validity based on the accordance to other legal norms. The school of Legal Realism gave primacy to an external judgement of efficacy dependent on the enforceability of legal rules. And finally, for those scholars ascribed to the field of Critical Legal Studies, it was not so much the morality, validity or efficacy of the law that mattered, but its ideological dimension: the role played by the law in the maintenance and reproduction of existing relations of power.

Whether a jurist favours one or another of these four schools, or a combination of several of them, there are at least two characteristics that they all share –as I argued in Chapter One. First, all these schools share a certain disregard for the “man of flesh and bone” (Unamuno, [1913] 1972) that goes before the law hoping to attain justice. And, second, we could also add that every person with a minimum of

training in law is taught from the very beginning that law and justice are two separate things –and that regardless of any personal opinions on the latter, from a professional perspective the only thing that matters is law as such, not justice. This research is meant to shed some light on the first of these two aspects, the “man of flesh and bone” that goes before the law expecting to obtain justice, but if it is to do so...How is it that a subject may still hope to attain justice from the law when most –if not all– of the people working in that field know that law and justice are two separate things? Why is it that we still have ministries of justice, courts of justice, and even *justices* as synonym for *judges*, when what they actually do is to apply the law and not necessarily give justice?

Understandably, if we are to analyse the divergence between the way in which legal institutions portray themselves as the hallmark of justice and their actual functioning as legal enforcement mechanisms we need to consider some of the insights provided by two of the schools mentioned in the previous paragraphs: Critical Legal Studies and Legal Realism. That is, we need to consider (1) the ideological use of the concept of justice displayed by different legal and political institutions, and (2) the materiality of such ideological practices: the effects of the association between law and justice on the actual enforcement of legal norms.

The ideological dimension of law and its ‘predatory use’ of the term ‘justice’ is marked by two distinctive, although closely interrelated, features: on the one hand, the way in which its self-depiction as an unavoidable, necessary, and even quasi-natural phenomenon aims to preserve its own authority (Derrida, 1990); and, on the other, how its use of the term justice seems to indicate its power to satisfy any claim made in such terms.

In both cases the effect on the particular subject interacting with the law –either by choice or necessity– is the same: a sense of powerlessness derived from the humbling inescapability and omnipotence of the law in the age of biopower. Birth, fingerprints, blood type, ID cards, passports, medical history, work history, education, friends, webcam, CCTV cameras, email, phone number, browsing history...having every single aspect of our lives thoroughly collected, monitored, measured, scrutinised, and evaluated by public –and also private– institutions, only one thing is certain: the sanctions outlined in different legal texts may be more or



less severe, we may agree or disagree with the functioning of the law, we may or may not like it, but there is no escaping it. If these institutions set their minds to it, they can know nearly everything about anyone. Thus, and considering its constant and ubiquitous references to justice, should we have any grievances or any particularly disturbing circumstances in our lives, law tends to appear as *the* institution with adequate and sufficiently powerful instruments to satisfy our claims for justice. Both aspects of the ideological dimension of the law –its inescapability in the event that we may break it, and its purportedly overwhelming power to provide us with the justice that we may hope to attain from it– have at least one distinctive material effect closely related to the production of subjectivities and the actual enforcement of legal norms: the production of normalised and law-abiding individuals under constant and subtle surveillance, the production of “docile bodies” (Foucault, [1975] 1995, 135-139).

In the first place, the cloak of omnipotence with which the law clothes itself in this type of context has the potential to strengthen the subject’s sense of helplessness, augmenting his or her dependency on the law. And secondly, the purported inescapability of the law also dissuades the subject from breaking it or attempting to bypass its mediation. From the point of view of the production of subjectivities, the ideological dimension of the law results in a de facto reduction of the particular subject, “the man of flesh and bone,” to his role as citizen: his reduction to a set of measureable parameters with different degrees of legal, regardless of the true value of such “parameters” for the subject himself. And, from the standpoint of the actual enforcement of legal norms, the mass-production of docile bodies –subdued by the unavoidability of the law– results in a more efficient use of its instruments, reducing the necessity of its enforcement to a minimum.

It is at this point, between the expectations of justice promoted by the law and the sheer application of the latter, that contingency can be located as one of the constituent limits of the law as well as a departure point for the emergence of new subjectivities: as that which triggers the emergence of desires for justice, entices the production of narratives, and makes visible the abyss between law and justice. And, although the previous chapter delved into the appearance of narratives of justice in response to contingency and the failure of the law to offer a satisfying articulation

of it,<sup>84</sup> such meaning-making processes cannot be fully disconnected from the emergence of new subjectivities. Something that could be seen already in the cases of Irene Villa and Ángeles Pedraza.

*Of narratives and new subjectivities*

The harm suffered along with the disappointment resulting from the shortcomings of the law had an unbinding effect on both subjects: the meaning of their lives was questioned, their expectations were challenged, and their sense of continuity in life was broken. Even their identity and sense of self were put into doubt by the emergence of questions such as “Who am I now?” or “Why did this happen to me?” And yet, they were able to bring forth two divergent narratives of justice that allowed them, in one way or another, to put back together the pieces of their lives. These narratives acted as meaning-making processes and provided them with answers to these questions, allowing them to regain a sense of purpose in life. In view of the incapability of the law to provide them with the meaning that they sought, Villa and Pedraza collected the pieces of the wreckage left behind by the irruption of contingency in their lives, rearranged them in a new way, and moved on. They were able to reappropriate them in a new light (Benjamin, [1940] 1970). That is to say, they started a process meant in which they were retrieve the coordinates of their lives and gain new knowledge of “the causes of being what [they] are” (Rorty, 1989, 27). A process aimed to regain self-knowledge that turned out to be, at the same time, a process of self-creation: in the case of Pedraza, the loss of Myriam would no longer be –just– the loss of her daughter and the mother of her future grandchildren, but –also– the cause and driving force in her relentless struggle against ETA; in the case of Villa, on the other hand, the loss of her legs would no longer be –just– the incident that thwarted her childhood dreams, but –also– the event that made her be born again.

Villa and Pedraza were transformed by their experiences, by the irruption of contingency in their lives, but also by the narratives that they produced in order to make sense of their new situation: they were changed by and became identified with

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<sup>84</sup> The enforcement of legal norms necessarily confers meaning to the events that called for their application –even if only as a proof of its efficacy. And yet, however valuable that meaning could be from a legal perspective, it may not be the ‘kind of meaning’ pursued by the particular subject who goes before the law hoping to attain justice and see his symbolic universe restored.

the process of symbolisation resulting in the production of their own narratives of justice. But what triggered this transformation? What moved them into action in the first place? What is their driving force? What animates their narratives? What is the structuring element in the subjectivities emerging from them? How does that relate to the subjective understandings of justice stemming from their narratives?

Building on the study of contingency developed in Chapter Three, and before moving on to the analysis of the temporality of justice, here I will investigate (1) the form in which the irruption of contingency in the life of “the man of flesh and bone” leads to the disclosure of the gap between the sheer enforcement of legal norms and the kind of justice that a subject may expect to attain from the law; and (2) how, in turn, the emergence of desires for justice derives from such a gap, allowing the construction of new subjectivities around them. Desires that appear, as I will explain over the following pages, as the “condition that plays a structuring role in the Subject” (Bailly, 2009, 110). In other words, this chapter will centre its attention on the study of the emergence of desires for justice resulting from the – necessary– ideological failure of the law to adequately satisfy the demands of the subject, and how such desires may act as a driving force in the production of new narratives of justice.

This entails a twofold task: on the one hand, it requires explaining the emergence of desires for justice as a consequence of and in response to the limits of the law; and, on the other, it also calls for an explanation of the ways in which such desires can structure, shape, and give origin to new subjectivities and particular understandings of justice. For that purpose, over the following pages I will make extensive use of psychoanalytic theory and the work of Jacques Lacan<sup>85</sup> on the question of desire while also using the cases of Irene Villa and Ángeles Pedraza as an overarching guiding theme. Nevertheless, it should be clear that it is not my intention to psychologise a problem that, in spite of being most clearly visible in the emergence of particular claims for justice, is first and foremost of a political nature. Quite the contrary, the use of psychoanalytic knowledge in this

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<sup>85</sup> It would have been possible to choose a different path in this regard. The work of other authors such as Freud, Ferenczi, Klein, Adler or Winnicott may also have offered valuable insights in the study of this topic. However, the centrality of desire in Lacanian psychoanalysis, along with its emphasis on language, seems particularly suitable for the study of this phenomenon and its relation with the production of narratives of justice.

chapter is meant to complement the insights provided by legal theory, political philosophy, and sociology throughout this thesis in an attempt to offer a psychosocial approach to the study of justice. Hence psychoanalysis' emphasis on the unconscious, its capability to outline "patterns of desire in which subjects become stuck" (Frosh, 2010, 186), along with its capacity to question and unravel meaning (ibid. 185) appear significantly valuable in this regard and cannot be easily dismissed.

The goal of this chapter is, in the end, to analyse the appearance of desires for justice in relation to law, the effects of the logics of desire and *jouissance* on the emergence of new subjectivities and subjective understandings of justice, and also the interconnection between both logics and the possibility of attaining justice within each of them. For that purpose, the first section of the chapter will review the relation between need, demand, and desire, along with the role of law in the formation of desires for justice. The second one will deal with the importance of the process of symbolic castration and the hypothesis of the phallus in the development of the troublesome relation between law and the justice-seeking subject. The third section, building on the previous ones, will discuss the psychosocial effects of conceiving justice either as an object cause of desire or as a partial object of *jouissance*. And finally, the fourth section of the chapter will deal with the interconnection between both logics and the possibility of moving from an understanding of justice based on desire to another one anchored in *jouissance*.

### **The formation of desire**

If we are to understand what we mean by "justice," if we are to comprehend how we use and understand this particular term in our interactions with the law, it is necessary to get a better grasp of the differences between what we are asking for and the kind of justice that we truly want. We need a better understanding of the differences between what we say and what we mean. Or, to put it differently, we must understand the difference between *demands for justice* and *desires for justice*: the reasons for the appearance of such desires, their origin, their functioning, and their goal.

Putting the cart before the horse, we could arguably say that the hypothesis linking this chapter to the previous one is that desire seems to underpin the

production of narratives of justice –including their final configuration in terms of fate and character– and the subjectivities emerging from such meaning-making processes. That is to say, that an object of desire or a goal seems capable of restoring meaning to the life of a subject who, not only acts as the artificer of a new symbolic universe built upon the ruins of another, but also becomes identified with it.<sup>86</sup> As with Zarathustra, in this process the subject comes to strive for his work but also becomes, in the words of Don Quijote, “the child of his deeds”: the subject is not only the artificer of a meaning-making process, but its result as well.

If we are to investigate this hypothesis, we need to ask ourselves *why* and *how* the emergence of desire for justice comes to underpin the production of alternative narratives and subjectivities. In order to do this, we have to take as a departing point the relation between subjectivity, law, and justice outlined in Chapter Two. In it, the study of subjectivity as a constituent limit of the law aimed to clarify the way in which the latter produces subjectivities –by being imposed on individuals and providing them with a sense of belonging or unity– while also remaining abstract for the sake of being applicable to the entire political community: a generality of subjects distinguishable from *a* particular subject and the whole of humanity. A contrast that creates the conditions of possibility for the emergence of claims for justice with the potential to reveal and challenge the limits of the law. And it is precisely in this chasm between a legally-produced identity and its subsequent exclusion of particularity and universality that the symbolic character of the law becomes visible at last.

As with other sociocultural productions belonging to the register of the Symbolic –including language, religion, political community, institutions, practices and morals– law appears as a trans-subjective milieu that pre-exists individual human beings and constitutes them as subjects within a structure: as citizens or foreigners, as particular subjects or as members of a larger political community, as justice-seeking or justice-providing subjects. A succession of dichotomies, correlative to one another, that crystallises how the law –as part of the register of

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<sup>86</sup> The importance of these “goals” could be seen already in Chapter Three. They appear as a key-stone to the narrative of the subject, holding it together whether we are talking about a desire to bring a police-based end to the activity of ETA –as in the case of Pedraza– or a wish to share with others the importance of moving on and overcoming obstacles in life –as in the case of Villa.

the Symbolic— introduces a series of negativities and antagonisms in the register of the Real that results in the constitution of the abovementioned subjectivities and the exclusion of the particular and the universal from its domain. And yet, it is precisely this exclusion that provides us with the necessary tools to understand the emergence of desires for justice and their role in the appearance of new subjectivities. It is this exclusion that allows us to perceive the difference between “the man of flesh and bone” and the citizen as “speaker of the language of the law”... and how the formation of desires for justice in the former comes to question the prominence of the latter in our interactions with the law. An interaction that creates the conditions of possibility for the emergence of new subjective understandings of justice.

*Need, demand, and desire*

At the beginning of this chapter, while discussing the differences between two types of contingencies, it was stated those that are of true interest to this thesis are those with the potential to dismantle our symbolic universe and shatter whatever narrative we may have constructed prior to that point. Contingencies that may require us to go before the law in the hope that the legal norms meant to provide us with stability and security may also be able to restore normality to our lives. And, in this quest, we may very well seek to give testimony –to share our experiences and present our grievances– in a place of recognition –law– as valid interlocutors, but also to see an external authority satisfy our claims and recognise the particular value of our testimony.

It is at this point, in the difference between being admitted as valid interlocutors and seeing our demands satisfied, that it finally becomes possible to establish a connection between contingency, law, and the Lacanian theory of desire. Spurred by a psychological *need* to articulate contingency in a meaningful way and reconstruct a symbolic universe in tatters, the subject may seek help –under the name of justice– from an Other: from the law. But in order to do so, in order to be understood and express an unequivocal signal of the existence of such need –so it can be properly addressed and satisfied– the subject must also accept and speak “the discourse of the Other.” That is, he must articulate a *demand* capable of expressing his neediness, presenting himself before the law not as a particular subject X who enjoys A, fears B, regrets C, and loves D, but as a citizen: as *just* another member

of that political community, with such and such legally relevant features. In other words, in order to see his needs satisfied by the law, the “man of flesh and bone” must wear the mask of the citizen: the mask of generality.

This excludes the possibility of making demands in terms of pure particularity or universality<sup>87</sup>: it excludes the possibility of recognising the value of particular bodily experiences that escape the disciplinarity of law and the state. On the one hand, if the subject’s need for meaning was expressed as pure particularity<sup>88</sup> in some sort of “private language” (Wittgenstein [1953] 1967, §243-§271) the law as Other would not be able to understand the message insofar as a particular case only becomes legally relevant inasmuch as it can be comprehended within broader legal categories. And, on the other, if such need was expressed in terms of pure universality,<sup>89</sup> the law as Other would be unable to know whether the subject is addressing it or not. Therefore the subject cannot present himself as John Smith, who loves meeting with his friends to eat pizza and drink beer every other Friday. Nor can he present himself as John Smith “the human being.” In order to see his needs addressed and potentially satisfied, the subject must relinquish these two dimensions and present himself as John Smith “the citizen” –with NIN SR123456A, born in 1985, son to John and Jane, etc. Hence whatever needs the subject may have, they must be presented as demands articulated in the terms established by the law as socio-symbolic Other. That is, in terms of generality. Trivial as it is, the example above gains some relevance once we put it into perspective and start considering the tension between particularity and the generality imposed by the law in the cases of Irene Villa and Ángeles Pedraza: How can a legal norm account for the suffering of a 12 year old girl who has lost her legs? How can it determine the value of and give proper recognition to the experience of losing your daughter, someone who is, in a certain way, part of you?

The necessity to present oneself just as a citizen and speak the discourse of the Other entails, in this manner, that the subject may very well need help from the law in order to restore meaning to his life, but he has to *ask for it*: he must make a

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<sup>87</sup> The relation between these two concepts was discussed in Chapter Two.

<sup>88</sup> E.g. as the exact conflict W over the particular object X between the two contingent subjects Y and Z.

<sup>89</sup> E.g. “this kind of conflict should be solved!”

demand. And, in the end, it is this very gap between what we need and what we ask for, the gap between need and demand, which allows us to witness the emergence of the third element in this conceptual triad: the emergence of *desire*. It is the difference between what we need and what we ask for that permits us to distinguish them both from what we want: what we desire.

Desire appears as the surplus generated by the articulation of need in demand, beginning to take shape “in the margin in which demand rips away from need” (Lacan, 2005, 689). It emerges as the result of a process of symbolisation that charges needs with surpluses aiming to disclose the position of the subject in relation to the Other: as the wish of “the man of flesh and bone” not just to see his need satisfied, but also to see his most radical particularity recognised by the law. Hence the articulation of a demand always plays a twofold function: on the one hand, it aims to satisfy a need; but on the other, it also constitutes a demand for love. It is the wish to see recognised the bodily experience of that which cannot be reduced to measurable parameters and necessarily escapes the disciplinary power of law. It entails a questioning in which the subject urges the Other to answer the question ‘Who am I for you?’ Propelled by a sense of meaninglessness stemming from the irruption of contingency in his life and the need to reconstruct a wrecked symbolic universe, the subject makes a demand in legal terms requesting the application of the law, of the norms meant to restore normality to his life. But the sheer application of legal norms does not suffice: the subject *wants* that application to provide him with meaning and a sense of purpose in life, with full presence. In his demand for justice, the subject requests the enforcement of the law, but he also wants to have his particularity recognised by the law in the effort put into that very enforcement –an “inessential part of the demand” (Bailly, 2009, 115) that, in the end, can only be demanded obliquely: justified and covered up by the essential part of the demand: the request for the application of the law.

Ultimately, the subject hopes to see the law enforced and the particularity of his case recognised, but there is a limit to what the law can do in this regard:

[the subject’s relation to law] is one of being abandoned to the force of its own performance, of being transformed into bare life, at least for those who are excluded from its domain. This exclusion is always present as potentiality, a *sine qua non* of the law and the state as an embodiment of its form. (Aretxaga, 2003, 407)



Law appears limited in its capability to provide the subject with any recognition beyond that of his role as citizen and whatever legally relevant attributes the subject may have. The “rest” of the subject, that which differentiates “the man of flesh and bone” from its façade as citizen, is potentially excluded. Law introduces a negativity in the subject, a divide between legally relevant and legally excluded aspects of his life that reflects, in turn, law’s own division between its ideological dimension and its actual enforcement, following from a logic of modern efficiency: ideologically, it is the citizen that matters; but practically, it is the body, the excluded and bare life of the subject that endures its effects. In order to remain in force, it requires the citizen to obey but it also needs “the man of flesh and bone” not to obey. However, the institutions in charge of enforcing the law cannot afford to have everyone disobeying it. Overwhelming as their power may be compared to that of an individual subject, the resources and instruments of law enforcement institutions are not unlimited and, in order to maximise their efficiency, their demands for obedience must be backed –at an ideological level– by a discourse capable of posing it as infallible and omnipotent: as an unavoidable and unsurpassable force. And, as Arexaga points out, in order to do so modern law requires subjects potentially reducible to bare life, legible and manageable “docile bodies” (Foucault, [1975] 1995, 135-139) upon whom legal norms can be efficiently applied: it requires subjects who have internalised the inescapability of judgement and punishment along with a certain degree of trust and dependency on the capacity of legal institutions to provide them with justice. It is not enough to have “courts of law” or “ministries of law”: it is necessary to have courts of justice and ministries of justice capable of ensuring, at the level of ideology, the production of docile bodies. A discourse in which the subject who hopes to attain justice from the law must participate: a discourse by means of which the man of flesh and bone is trained, tamed, educated and disciplined to believe the law to be an omniscient and omnipotent Other.

[t]he categories used by state agents are not merely means to make their environment legible, they are an authoritative tune to which most of the population must dance (Scott, 1998, 83)

But even if the use of these categories and the term “justice” itself is not innocent, law as an authoritative Other is just as lacking as the subject himself. A

less-than-omnipotent character that is revealed in its very application. Through its enforcement mechanisms, law can satisfy the need of the subject once it has been articulated in legal terms, but not the desire for justice arising from such process of symbolisation: it cannot satisfy the subject's demand for love. It cannot recognise its radical particularity. Understanding love as "giving something you haven't got to someone who doesn't exist" (Philips, 1994, 39), we could arguably say that, in a certain way, the subject urges law to love him, to provide him with something that, ultimately, it cannot give due to its general character: full presence, the universal recognition of his particularity. From a legal perspective a subject is relevant only as the speaker of the language of the law, as a valid interlocutor in his functional role as citizen. That is, as "the body lost by the slave, which becomes nothing other than the body in which all other signifiers are inscribed" (Lacan [1991] 2007, 89). The constellation of factors that determine the particularity of the subject—including name, personality, tastes, fears or suffering among many others—are irrelevant from this point of view: ultimately, all that matters is the role of the subject as citizen. And thus, the possibility of being loved, of being recognised in one's own particularity, is excluded.

In its majestic equality, the law forbids rich and poor alike to sleep under bridges, beg in the streets and steal loaves of bread.<sup>90</sup> (*The Red Lily*, Anatole France)

Reducing all differences among citizens to identity, the "majestic equality" of the rule of law, is, in the end, the quintessence of this form of generality. Before the law all citizens are equal, reduced to a shared identity in spite of their many differences.<sup>91</sup> A forceful generality that makes it incapable of love insofar as it cannot give full presence to particularity nor recognise the subject behind the mask of the citizen. And it is precisely in this blindness to particularity that the functioning of law is revealed as a far cry from its ideological façade: it is at this point where it is revealed as an instrument capable of satisfying a demand for its application through its sheer enforcement, but also completely unable to satisfy the desire for justice of the subject. A desire that is disclosed as constitutive lack: as the

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<sup>90</sup> "La majestueuse égalité des lois, qui interdit au riche comme au pauvre de coucher sous les ponts, de mendier dans les rues et de voler du pain."

<sup>91</sup> In the eyes of the law these citizens remain different from those belonging to other states. See Chapter Two for a more detailed discussion of the relation between particularity, generality and universality.

impossibility of seeing one's own particularity universally recognised in law. That is, as the lack experienced by the subject in the wake of law's silent answer to the question "Who am I for you?"

The imagined nation state, which is supposed to provide for its citizens seems remote and careless, not fulfilling its obligations and generating a discourse of state deficit, an insufficient state which has abandoned its citizens. [...] The nationalist discourse of citizenship remains attached in the social imaginary to the state but clashes with the actual experience of marginalization, disempowerment, and violence. (Aretxaga, 2003, 396)

The less-than-omnipotent character of the law revealed in its inability to give an answer other than "just another citizen" to the question "Who am I for You?" does not quench the desire for justice of the subject. Quite the contrary, it becomes reinforced and reproduced in its very disavowal, triggering the production of alternative narratives of justice. The disruptive effects of contingency put the subject on the path to reconstruct his symbolic universe: to find in the Other a master signifier capable of ordering his life and conferring meaning on it once again. The subject "expects to receive from the Other [law] the complement –the precise thing [justice]– that will fill this lack and complete it" (Bailly, 2009, 110), and yet, the Other is, as stated above, as lacking as the subject himself. The justice, the universal recognition of a particularity, which the subject expects to receive from the law is out of reach. The "majestic equality" of the law prevents it from putting any "extra effort" into the satisfaction of his demands since all must be treated equally. But "equally" is simply not enough for the subject: it is *his* life, *his* suffering, which is at stake. Not any others'. The disobedience of the law to the demands of the subject along with the absence of the exact thing, the imaginary object, theoretically capable of filling his lack only reinforces the belief in the capacity of this "imaginary justice" to restore meaning and stability to the life of the subject. His longing for meaning persists not simply *in spite of* the impotence of the law, but it is strengthened *by* it: "If I get the justice that has been denied to me, if I attain it, I will finally be able to rest and be at home with myself."

In the quest for the missing object of desire, the subject becomes identified with this absence: with his lack.<sup>92</sup> He is finally granted a sense of purpose in life, albeit in a “twisted” way: it is not the full-presence that he hoped to attain from the law, but the very absence of it that allows him to build a narrative capable of repairing his symbolic universe. It is not the absolute and complete defeat and disappearance of ETA, but the absence of it that allowed Ángeles Pedraza to reconstruct her symbolic universe around the “sacrifice” of her daughter. And, in the same manner, it is not the complete overcoming of the physical and psychological difficulties caused by her injuries, but the day-to-day tasks that it entails that allowed Irene Villa to carry on with her life. Over the following sections I will discuss in greater detail the differences between the two cases in relation to the question of desire, but for the time being it should suffice to say that both of them were able to restore meaning to their lives not because they saw their particularity recognised by the law, but precisely because they did not. The subject comes to identify himself with the absent object of desire, and it is around this absence that his narrative of justice is constructed. In the words of Lacan: “what gives support and consistency to the ego is this lost object” ([1991] 2007, 50).

*Revenge and justice’s uncomfortable need for the law*

At this point it may seem that law, in its radical generality, appears as an obstacle to the satisfaction of the desire for justice of the subject. The reality, however, could not be more different. The generality of law is the very condition of possibility for the emergence of these desires in the first place. Without entering the Symbolic, without an Other capable of satisfying the needs that we cannot cover by ourselves and to whom we can address our demands there cannot be such a thing as desire:

language is acquired by the child in order to fulfil need –if there was never a need to ask for something, it would not need to ask for something, it would not need to speak; another way of looking at it is that need *justifies* the demand, which is, in fact, usually aimed at the satisfaction of something [...] for which there is no proper justification (Bailly, 2009, 117).

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<sup>92</sup> A lack or absence that in some cases can be transformed into loss by means of narrative, “inviting the generation of scapegoating and sacrificial scenarios” (LaCapra, 2001), as seen in the case of Ángeles Pedraza.

However flawed it may be, the rule of law appears as a necessary intermediary and essential component in the emergence of desires for justice. An incident that recently occurred in Khajuri Khas, India, can be enlightening in this regard: that is, concerning the necessary role of law as an intermediary in the emergence of desires for justice. According to a BBC report,<sup>93</sup> in October 2014 a 36 year old man kidnapped, mutilated and murdered his tenant before willingly turning himself in to the police: the man had raped his 13 year old daughter, making her pregnant. The story generated great sympathy for the father in India, where the reporting of rape cases went up from 24,923 in 2012 to 33,707 in 2013, and many considered him “a hero” who “did what he had to do”:

“Any father would do that. [...] What’s the point of going to the police and courts? They ask for all kinds of evidence. In our country, justice takes too long. Justice should be done in two months, but here cases go on for six-seven years.”<sup>94</sup>

The manifest impotence of the law in this regard, its inefficiency and flawed enforcement, disqualifies it as an ideologically viable Other capable of satisfying the needs of the subject. The idea of justice remains attached in the social imaginary to law, but it clashes with the actual experience of abandonment, marginalisation, disempowerment, and violence derived from its shortcomings. In this regard, and whether we find the case above justifiable or not, what is truly remarkable about it is the complete silence of the father until the deed was done: for him, there was no need to interact with the law in order to do this. He was aware of the limited capacities of legal institutions in this regard. He knew that they could not provide him with that which he needed. There was no need to articulate a demand; and, consequently, no desire either.

Thus, the emergence of desires for justice requires the presence of law (1) as a potential space of recognition where we can give testimony and present our demands, and (2) as an external agent—an authoritative Other— theoretically capable of satisfying them. And yet, these desires and subjective understandings of justice that they underpin pose a challenge, putting into doubt the might of law and making evident the abyss between its ideological façade and its actual functioning.

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<sup>93</sup> <http://www.bbc.co.uk/news/world-asia-india-29901304>

<sup>94</sup> Ibid.

## **The troublesome relation between law and the justice-seeking subject**

Interesting in its own right as it may be, so far it would seem that the emergence of desires for justice does not present any significant differences with the emergence of other kinds of desire: there is a need, there is a necessary entry into a given symbolic structure, and there is something that, while escaping the symbolic, also demands recognition and satisfaction. In principle it does not present any relevant deviations with regard to the general Lacanian theory of desire. And yet, this apparent correspondence fades away once we take into consideration the particularities of the law qua Other. For that purpose, in this section I will compare the emergence of desires for justice in relation to law as a singular Other to the more traditional emergence of desires in early childhood in relation to the development of the hypothesis of the phallus and the access to the paternal metaphor as part of the process of symbolic castration.<sup>95</sup>

The already mentioned “Who am I for you?” used by the subject to urge the law to universally recognise his radical particularity is not so different from the questions that arise when an infant forms the hypothesis of the permanence of objects. A hypothesis closely related to the appearance of the concept of ‘Mother’ as a primary act of symbolisation by means of which the maternal figure comes to stand for a sensation of comfort, satisfaction or care, but also of discomfort and uncertainty when she is not present. This hypothesis is formed as a consequence of the periodical disappearances and reappearances of the mother, eventually leading the infant to understand that, as an object, she persists even when she is not within view. And it is in the wake of the formation of this hypothesis that we can witness the emergence of a series of questions: Where does she go when she is not with me? Why does she leave me? What could be so important?

These are questions that resonate not only with the urging of the justice-seeking subject, but even with the biblical “Father, why have you forsaken me?” But as I will argue, there is a closer connection between the latter and our subject’s “Who am I for you?” than between any of them and the kind of questioning resulting from

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<sup>95</sup> As stated earlier in this chapter, the use of elements from psychoanalytic theory such as “symbolic castration” is not meant to psychologise an eminently political problem but to illustrate and allegorise it with the purpose of bringing forth a psychosocial approach to the study of justice.

a 'regular' process of symbolic castration. According to Bailly (2009, 75), the first obvious explanation for the absences of the maternal figure is the Father:

He is the other thing in the baby's world which might account for Mother's going away – and proof of it comes when she says to the child: *'It's time to sleep. Mummy and Daddy must have their dinner now.'* Father occupies a place in the child's world as the single biggest distraction for Mummy and therefore the single greatest rival to itself. [...] The hypothesis made by the child to explain Mother's 'choice' of Father is necessarily that *'Father has something I haven't got.'* But equally, sometimes Mother is with the baby, with the baby, who might then quite naturally think *'Whatever it is, maybe I have it too.'* The baby has now hypothesised the existence of *'the thing that satisfies Mother'*, or in Lacanian terms: the object of Mother's desire. (Ibid.)

That is to say, the first answer to the questions arising at the beginning of this process is the Phallus: the signified of the object of the Mother's desire, the idea of the object that can keep her close at hand for as much as the infant may want her to be. Eventually, the maternal figure, the primordial Other, may explain her absences by means of what Lacan calls the 'paternal metaphor' –also known as the Name-of-the-Father. A metaphor that consists in blaming her absences on duty, on the submission to rules (law), and not on a desire to leave the infant. The consequences of this explanation, the consequences of the use of such metaphor, are key to understanding the singularity of the law as a necessary Other in the emergence of desires for justice. If the mother –that overwhelming primordial Other– must submit to certain rules beyond and above her control, that entails that she is not the Other: the Other must be someone else, the one that possesses that which she cannot ignore (the Phallus), something so powerful that it can make her follow its commands even against her will. In other words, this metaphor entails that there must be something –the father, work, or any other kind of rule or authority– capable of keeping her under its control.

In this way the child undergoes castration and enters the register of the Symbolic: first, forming the hypothesis of the Phallus as an explanation for the motives behind the disappearances of the mother; and then, recognising the Name-of-the-Father as the holder of the Phallus: as the possessor of that which the child does not have. Therefore, the process of castration is "the acceptance that one is less-than-perfect, limited, not all powerful and able to control the world [...], a

process which allows the child to situate itself within the Law, and to accept that its own desires are not paramount” (Ibid., 80).

*The law as (m)Other*

This process presents us with three particularities of the law qua Other. The first of them would be that law plays a dual role in the process of symbolic castration taking place within its limits: as environment or field of recognition, and as Other of the justice-seeking subject. On the one hand, we could arguably say that law plays an environmental role as field of recognition –or even that *law is language*– insofar as it establishes the parameters of interaction between the subject and his Other. And, on the other, it also acts as Other of the subject insofar as it appears as the agent capable of satisfying and comforting the subject in the wake of the existential instability following the irruption of contingency in his life. An agent ideologically depicted as a source of comfort, care, and satisfaction that, nevertheless, can also appear as a cause of distress, frustration, and disappointment when it is “absent”: when there is something more important than the requests of the subject and his wishes are contradicted.

The second particularity of law stems from the first one: it allows the formation of the hypothesis of the Phallus. That is to say that, if the law sometimes attends and sometimes dismisses the grievances and claims of different subjects on a case by case basis, there must be something that captures its attention. There must be something that it desires, and maybe the subject has it too. The nature of this object of desire is not difficult to imagine. It is that which the law requires from the subject regardless of his personal situation: obedience. And such obedience is manifested, first and foremost, in abiding by the law and speaking its language if the subject is to be recognised as a valid interlocutor and see his demands taken into consideration. Hence the process of symbolic castration undergone by the subject permits the formation of the hypothesis of the Phallus and a partial entry to law qua field of the Symbolic.

The third and final particularity of the law is by far the most relevant one, and also the one that makes the emergence of desires for justice significantly different from the emergence of other types of desire. Namely, that the law has no Other, and therefore it does not permit the emergence and acceptance of the paternal metaphor.



Saying that the law has no Other entails that it does not recognise any rule or any reason beyond and above itself: it can only be under its own control, and therefore its power is absolute insofar as it is only its own restraint that prevents it from falling into arbitrariness, if not outright tyranny. In the case of Western countries this is arguably quite straightforward: the rule of law implies that no one is above the law, that all citizens are equal before it, and that it must be equally applied to all of them. In sum, it implies that the law obeys nothing except its own designs, and even if it is changed or abolished, it has to be done following the procedures and institutional arrangements established by law itself. However, there are at least two possible counter-arguments against this claim that the law has no Other: human rights, on the one hand, and theocracies on the other. We can agree that human rights are, in theory,<sup>96</sup> above national positive law: they are the pinnacle of the legal pyramid. Nevertheless, this purported superiority of human rights does not invalidate the argument presented here: as part and pinnacle of the legal pyramid, there is no authority above or beyond them, nothing that could legally justify their violation. Something similar occurs in the case of theocracies, where a perfect concordance is established between positive and religious commands. And yes, just as in the case of human rights, there is nothing beyond or above the law insofar as it is literally the word of God.<sup>97</sup> In both cases, however, the non-recognition of an authority above or beyond the law –the denial of the existence of any Other than law itself– follows suit and results in the same scenario as in the case of the superiority of the rule of law.<sup>98</sup>

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<sup>96</sup> This theoretical superiority of human rights over national positive law is critically questioned in works such as *Against Human Rights* (Žižek, 2005), *Homo Sacer: Sovereign Power and Bare Life* (Agamben, 1995), and *State of Exception* (Agamben, 2005).

<sup>97</sup> In this regard, the relation between *Halakhah* and *Aggadah* in Judaism constitutes an incredibly interesting case study due to its parallelisms with the relation between law and justice as it is being developed in this research project.

<sup>98</sup> We may also consider the widespread use of constitutionally established pardons as a counter-argument against the claim that law has no Other. However, there are two caveats against this possibility: on the one hand, they are constitutionally established, inscribed in the law, and thus part of law itself; and, on the other, they can only be given after a final court ruling. That is, pardons do not entail a non-application of the law but only a suspension of its effects.

### *The law as Phallic Mother*

One of the ideological consequences of the statement “law has no Other” has been discussed already: law presents itself as an omnipotent, omniscient, inescapable and unavoidable quasi-natural phenomenon. And yet, sometimes it falls short, sometimes it is absent. In some cases the courts of justice may take into consideration the requests of a citizen and enforce the law accordingly. In some others, however, they may take such requests into consideration only to dismiss them later on in favour of more legally relevant arguments. And in other cases, in those situations in which the subject fails to articulate his demand in the terms established by the law, the courts of justice may dismiss in toto without even considering them. That is, a series of ostensibly whimsical “disappearances” and “reappearances” of the law, in the guise of its enforcement, that have the potential to give rise to a series of questions resembling those of the infant bearing with the absences and reappearances of the mother: Why does law ignore me even if I have been so obedient and I haven’t done anything wrong? Who is it satisfying when it chooses to dismiss my requests? Why that person and not me?

Such questions reflect the formation of the hypothesis of the Phallus permitted by the law: “that person must have something that I may or may not have that makes the court rule in his favour.” However, and unlike what happens in the case of the symbolic castration undergone in early childhood, the law does not permit reaching the next stage in this process: it does not permit the emergence and acceptance of the paternal metaphor. Yes, there is something –an imaginary Phallus built around the idea of the disciplined, obedient, and law-abiding citizen– that sometimes keeps it close at hand and sometimes draws it away. However, there is no clear explanation for such behaviour other than the internal logic of law itself: there is no clear explanation other than its own will. And it is in this apparent mismatch between law’s ideological façade and its actual enforcement –its overwhelmingly whimsical behaviour– that the law appears as a phallic mother obeying no reason or logic beyond its own, leaving no room for an explanation within the framework of the paternal metaphor.

The anxiety arising from this dyadic relation between the subject and the law in its role of the phallic mother cannot be easily dismissed:

This situation of the Other in a third party outside the dyadic relationship is experienced both as a loss of power for the child (which may still hope to control the mother) and also as a great comfort –for it explains the mother’s otherwise frightening behaviour, which previously appeared whimsical and persecutory. Imagine how much less terrifying for the child to be able to think ‘*She’s refusing me this because of something*’, rather than simply ‘*She’s refusing me*’ (Bailly, 2009, 81)

Lacking a Name-of-the-Father, a metaphor or explanation that could account for such behaviour, the subject may find himself trapped between the fantasy of controlling law in its role of phallic mother through even greater submission to its dictates –thus becoming an even more docile body– and the persecutory feeling stemming from its inexplicable disappearances and dismissals. Hence the relation between law and the subject –along with its implications regarding the formation of desires for justice– is marked by a failure in castration:

If, however, the child does form the hypothesis of the Phallus, but the mother never speaks the paternal metaphor, then the child may remain in a fantasy that it has or is the Phallus for the mother. In this case as well, the relationship remains dyadic, but now the child may fantasise that it is the lawmaker, the omnipotent and omniscient. This leads to a psychotic structure but not necessarily pure psychosis; this structure is characterised by its difficult relationship with the Law in all its forms, some paranoid elements (as a failure of its will is experienced as persecutory rather than logical in a wider context), and a certain inflexibility with language (Ibid., 82).

Insofar as the abovementioned dyadic relation between the subject and the law persists, the ideological dimension of the latter becomes reinforced, strengthening the dependency of the subject on it. On the one hand, it induces the subject to believe that he is “the lawmaker,” that his interests and those of the law are one and the same (Althusser, [1970] 2001) provided that he believes himself to be the imaginary Phallus: the obedient and docile citizen that the law so desires. And, on the other, any failure of the law to satisfy the demands of the subject is not presented as such, but as a failure of the subject to prove himself worthy of securing a more favourable ruling at court. In consequence, if the shortcomings of the law are experienced as a failure of the will of the subject, the latter is expected to either accept the superiority of the law regardless of his personal opinions on the matter,

or go before the law once again and try to prove himself more deserving of a better ruling.<sup>99</sup>

If we wonder about the persistence of this kind of relation, about the enduring refusal of law to abide to any form of external rule or principle, it is necessary to ask ourselves ‘*cui bono?*’ Who is profiting from this situation? Given the dependency that it causes and strengthens in relation to the subject, the one benefitting from this would be law: it sees its authority self-legitimised and augmented while freeing itself of any responsibility derived from its own failure to satisfy the demands of the subject, who becomes progressively more dependent on it. Indeed, and in spite of its self-purported role as ultimate Other, it would seem that law requires increasingly high levels of dependency in order to secure –or at the very least improve– its own functioning:

Lacan’s claim that there is no Other of the Other means that the Other and the statement have no guarantee of their existence besides the contingency of their enunciation. [...] The subject of the enunciation does not and cannot have a firm place in the structure of the Other (Zupančič, 2000, 30)

This entails that even if law presents itself as having no Other, it cannot guarantee its own existence beyond the constant flow of particular subjects knocking on its doors in search for justice. Without them, without the endless series of contingencies that leads these subjects to seek help from its institutions, the law would see itself as purposeless.

the cause of the cause can only be the subject itself. In Lacanian terms, the Other of the Other is the subject. [...] the will precedes all its objects. The will can be directed towards a certain object, but this object is not in itself its cause. (Ibid., 34)

Law appears in the guise of the phallic mother in its relation with the particular subject, increasing his dependency and submission while also freeing itself of all responsibility. But the truth is that this ideological operation in which law addresses the subject in his functional role as citizen is meant, in the end, to conceal its own lack: it is meant to cover up for its dependency on the contingent subject along with

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<sup>99</sup> This is the way in which the law portrays its relation with the subject. The latter may perceive an unsatisfactory resolution as a failure of the law, and request the sentence to be reviewed by a higher tribunal.

its less-than-perfect functioning. As in the Discourse of the Master, law appears as the agent of communication that is “addressing the other not as a Subject but in his functional role” (Bailly, 2009, 157) and enjoys his production: its own recognition as a valid authority and the growing dependency of the subject on it. It enjoys “the body lost by the slave [that] becomes nothing other than the body in which all the other signifiers are inscribed” (Lacan, [1991] 2007, 89).

At this point we already know that the relation between the law and the subject follows the logic of the Discourse of the Master. We also know that, more particularly, the law seems to operate in a way analogous to that of the phallic mother within this dyadic relation. But there is something that still requires our attention: the effects of this dynamic on the emergence of desires for justice, and the role played by justice in this equation.

*Justice: in search for a Name-of-the-Father*

In order to clarify these issues it is important to remember the conditions of possibility for the emergence of such desires: a feeling of dissatisfaction with the law when it structurally fails to recognise the particularity of the subject and the circumstances that led him to seek its help in the first place. That is to say that we may start making claims about justice when this Other proves itself too capricious or less-than-omnipotent. We may start to do this when the law fails and we want it to act in accordance with rules and principles more elevated than itself. Principles that may provide us with the kind of recognition that we seek and we have been denied. In other words, we may start making claims about justice when we realise that, in order to attain what we want, we need an Other of the Other: a higher authority that could make the law qua phallic mother less whimsical and more reliable. We start using “justice” as the Name-of-the-Father that we expect the law to obey.

Such use of the idea of justice appears as the result of the disavowal of the desires of the subject. Even if the subject is heard and acknowledged as a legitimate interlocutor, the gap between the enforcement of the legal norms and the recognition of the radical particularity of such desires pushes the subject to query the law further and further in an attempt to unravel the reasons behind law’s silent response to the question “Who am I for you?”

In other words, if the law's interactions with the subject mirror the logic of the Discourse of the Master, the enquiries of the subject appear equally coherent with the Discourse of the Hysteric:

It is to the master signifier that the Hysteric addresses his/her questions, but he/she receives as an answer only the knowledge of that person, which the Hysteric enjoys for want of anything better, although these answers never constitute a satisfactory response to his/her desire. The Master's willingness to answer the questions of the Hysteric is not fuelled by his/her wish to teach but is an effect of the unconscious connection with the *objet petit a* of the Hysteric [...]. The hysterical questioning pushes the master signifier up to the limits of its knowledge and leads to the Hysteric's frustration when this limit is reached. [...] It is only [those] who take up the Hysteric's discourse –who put their castratedness on the line, as it were, who truly gain knowledge. (Bailly, 2009, 156-158)

Expecting to be recognised in the extra effort put into the application of the law, the subject turns to the institutions meant to enforce it in order to discover the reasons for the dismissal of his desire. The subject questions the law in order to discover the object of its desire, that which could catch its attention and bind it to the will of the subject. In other words, the subject interrogates the law in order to attain the Phallus: in order to attain that which could grant him dominion over the law. Or, as Lacan puts it regarding the Discourse of the Hysteric: “The hysteric wants a master she can reign over: ‘she reigns, and he does not govern’” ([1991] 2007, 129).

Nevertheless, since the law seems to operate as a phallic mother that obeys no reason or cause other than its own, such questioning is doomed to reach an impasse: the tautological character of the authority of the law.

The master must be obeyed –not because we'll all be better off that way or for some other such rationale– but because he or she says so. No justification is given for his or her power: it just is. [...] The master must show no weakness, and therefore carefully hides the fact that he or she, like everyone else, is a being of language and has succumbed to symbolic castration. (Fink, 1995, 131)

The subject may disagree with and argue about the reasons for the disavowal of his desire –e.g. “Why is this formality so relevant?”, “Why aren't these crimes punished more severely?” or “Why does the law establish this specific requirement?”– but, in the end, the answer will always be the same: “because it is

the law.” The discourse of the Hysteric –the justice-seeking subject– aims to attain recognition and to dominate the master signifier –law– but instead it only produces knowledge: knowledge of the functioning –and limits– of the law itself. The frustration experienced by the subject and the subsequent process of questioning may not lead to the recognition that the subject expected to attain from the law in the first place, but it opens the gate to something else. It opens a window of opportunity for a questioning of law itself: of its current functioning and limits. It opens the door to something other than law that stands for the recognition denied to the subject in the first place; something above and beyond the law that could act as a binding criterion for its actions and make them less arbitrary once its limits have been made clear. As Walter Benjamin puts it: “The law which is studied but no longer practiced is the gate to justice” ([1934] 2005, 815).

### **Justice as object petit a, justice as jouissance**

The gap between the ideological façade of the law and its actual enforcement allows the emergence of desires for justice. In turn, these desires are shaped and affected by the particularities of the law qua Other –metaphorically appearing in the guise of a phallic mother– along with the existing dynamic between the Discourse of the Master employed by law itself –addressing the subject in his functional role as citizen– and the Discourse of the Hysteric displayed by the subject –who interrogates the law about the reasons for the disavowal of his particularity and ends up not gaining recognition, but rather knowledge about the functioning and limits of the law. As a result of this process, the subject may formulate a narrative, a particular understanding of justice, meant to provide him with the recognition that was denied to him by positive law. An understanding of justice that appears as the form taken by the desire of the subject in the wake of its dismissal by the law: as the struggle for a Name-of-the-Father capable of taming the law, and as that which could finally offer solace and recognition for the circumstances that led the subject to seek help from the law in the first place.

Considering that desire appears simultaneously as the ‘production’ or result of the Discourse of the Master, and as the ‘truth’ or driving force of the subject in the Discourse of the Hysteric, it becomes possible to establish a connection between the previous section and some of the ideas developed throughout Chapter Three.

And, more particularly, with Pedraza's narrative structure of fate. That is, the connection between her attempt to inscribe her own narrative in the law, and the idea of justice as Name-of-the-Father.

*Desires for justice*

Pedraza's dissatisfaction with the law, along with her view on Myriam's death as a sacrifice, results in an understanding of justice that would require the complete and total disappearance of ETA: a fateful and almost messianic understanding of justice whose goal is eternally displaced onto the future but simultaneously required by the past, by the sacrifice of her daughter. An understanding of justice that, in the context of the permanent ceasefire declared by ETA in 2011, can be seen not only as an attempt to oppose the law, but also to change it: as the attempt to inscribe her own suffering in it and ensure the survival of the fate that conferred meaning to her loss, and validate it as a sacrifice. Rather than opposing the rule of law, she identifies herself with it: "No one has done more to reinforce the rule of law in Spain than the victims of terrorist attacks."<sup>100</sup>

In her dyadic relation with the law as a phallic mother, enhanced by the ideological use of the Association of Victims of terrorism by the Spanish People's Party, Pedraza may have fantasised that she was –or at least, could have been– the lawmaker, that she was –or could have been– the Phallus of the law, oscillating in her relationship with it between feelings of omnipotence –the will of the victims *is* the rule of law– and persecutory delusions –the fact that the Parot Doctrine was repealed and that the Spanish Government might find a negotiated end to the conflict with ETA is part of a conspiracy to undermine the rights of the victims of terrorist attacks. A conspiracy that seems too capricious and makes no sense in the light of her sacrifice: her political benefactors have double-crossed her, the political party representing the interests of her 'enemies' has been legalised, convicted terrorists are being released in spite of all her efforts, and now even the Government is negotiating with them. The institutions meant to restore meaning to her life had failed her and thwarted her desire for justice. A desire that aimed to punish –as

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<sup>100</sup> Demonstration in Madrid against the repeal of the Parot Doctrine (27/10/2013): "No hay nadie que haya hecho más para reafirmar el estado de derecho en España que las víctimas del terrorismo."



severely as possible— all members of ETA and to bring about the complete disappearance of this organisation.

Making visible their disappointment with these events, Pedraza and the Association of Victims of Terrorism (AVT) organised a series of demonstrations to demand justice —even if the European Court of Human Rights had ruled against them and the “justice” delivered by the Spanish tribunals. In contradiction with the rule of law that she had identified herself with up until that point, Pedraza and her association called for ever harder punishments under the label of “justice”: they expressed their demand for punishment as the principle that should guide the application of the law. For her, no sentence would ever be severe enough, and a ceasefire and the virtual defeat of ETA would not suffice... However, and in her own words, her demand was for justice, not vengeance. In order to reflect on Pedraza’s rejection of the permanent ceasefire, her ongoing disappointment, and the thin line that seems to separate her desire for justice from an apparent wish for vengeance, it might be useful to consider Wendy Brown’s reading of Freud’s *A Child is Being Beaten* ([1919] 1963) in her book *Politics out of History* (2001). A reading that:

[does not aim] to psychologize political life directly, nor to reflect on the ways that sexual life bears on political life, but rather to allegorize a historical-political problem through the story of desire and punishment that Freud constructs [...]. My aim is to reflect on the ways that problematic [...] attachments function as a historically specific constraint upon emancipatory projects. (ibid. 47)

According to Brown, Freud concludes that this fantasy of punishment is developed in three successive phases: “a child is being beaten,” “I am being beaten by my father,” and “a group of children are now being punished” (ibid. 48-50). In the first one, the subject appears neither as agent nor object of the beating: presenting no masochistic nor sadistic elements, and resembling something similar to sibling jealousy —“my father is beating the child whom I hate.” The second phase, however, is masochistic and marked by guilt —caused by the desire for the beating of a sibling, and as a consequence of the repression of the incestuous love for the father— and appears both “as a punishment for the forbidden relation and also as the regressive substitute for it” (ibid. 49). Finally, the third phase covers for the previous masochistic one, reverting it into sadism once again.

Brown relates the origins and evolution of this fantasy to the unfulfilled promises of the symbolic and the emergence of identities containing “persisting yet thwarted desires.” More particularly, she points, on the one hand, to “the discovery [...] that the world to which they had presumed they belonged, and to which their fealty and passion are originally directed, did not in fact hold them in esteem” (ibid. 52). And, on the other, to the fact that politicized identities may arise if the liberal promise of “universal personhood” is found hollow, causing a foundational injury that may not contain only jealousy and disappointment “but also persistent, yet thwarted desires” (ibid. 53). Moreover, she goes on to say that an identity rooted in such an injury may have to be re-enacted over time, and that, “if it has been formed in part out of trauma, then there would also be a certain reassurance, and possibly even erotic gratification, in restaging the injury, either at the site of our own body [...] or the site of another” (ibid. 55), necessarily oscillating between sadism and masochism.

The case of Ángeles Pedraza presents some remarkable similarities with Brown’s account of *A Child is Being Beaten*. On the one hand, it is relatively easy to relate the origins of this fantasy in the unfulfilled promises of the Symbolic with Pedraza’s own disappointment with the shortcomings of the institutions that had enshrined her as a martyr of democracy, and promised to bring a police-based end to the activity of ETA. Institutions that, once the circumstances had changed, proved that the Association of Victims of Terrorism was not *that* important to them after all, and finally decided to restrain the enforcement of legal norms to that which was permitted by the rule of law and the European Court of Human Rights. And, on the other, Pedraza’s own identity as the personification of the struggle against ETA also has its origin in an injury caused by an arguably traumatic experience. An injury that was aggravated by the disavowal of her demands for ever harder punishments and that has led her to restage it periodically since 2004 in demonstrations, speeches, and interviews. A re-enactment that would be impossible for her and other victims if ETA finally disappeared.

Nevertheless, the similarities between her case and Brown’s account of Freud’s work appear to go further, to the origins and enduring character of this fantasy, making it possible to establish some parallelisms with its different phases too. For instance, the sibling jealousy crystallised in the statement “a child is being beaten”

resonates with the feeling of abandonment, and even betrayal, experienced by Pedraza when the European Chart of Human Rights and the Spanish Constitution were enforced for the sake of protecting the human rights of former members of ETA against her own views. After all, for years she had been told that they –the victims– were “the good ones,” and that they embodied the effort of the Spanish Government and the rule of law in their struggle against ETA...hence why had the law forsaken them to protect the rights of a ‘bunch of terrorists’?

But again, it is important to remember that in the dyadic relation between the subject and the law qua phallic mother, the latter does not obey any will but its own: the law had not forsaken the victims *because* of something, it had simply forsaken them. An ostensibly whimsical behaviour that also led to the persecutory delusions that characterise such a dyadic relation with the phallic mother –a relation in which the hypothesis of the Phallus has been formed, but for which there is no Name-of-the Father. And, if there is no clear reason for such ‘abandonment,’ then, the only possible explanation for the ostensibly capricious behaviour of the law is that it has been corrupted, and that even if Pedraza had been exploited for political purposes when it was convenient, it is necessary to change the law in order to serve ‘those terrorists’ the justice, the punishment, that they deserve. A line of thought and a wish to inscribe in the law one’s own understanding of justice as punishment and retribution that, when combined with the feeling of being punished –forsaken– by the law, echoes the oscillation between masochism and sadism that defines the second and third phases of the fantasy.

This is an oscillation that mirrors, in turn, the dyadic relationship with the phallic mother between fantasies of omnipotence and persecutory delusions: “If I manage to bind the rule of law to my will, then I am the lawmaker; but if I don’t, it has abandoned me for no reason whatsoever.”

One may wonder, though, to what extent Pedraza did really bind the law to her will and why it was not enough to satisfy her desire: why the punishments inflicted on former members of ETA were never sufficient –even if her association and the People’s Party had managed to have the rule of law trample itself for seven years by means of the Parot Doctrine.

The first of these points –the extent of her dominion over the law– was partially answered during the discussion about the emergence of fantasies of omnipotence as one of the effects of the dyadic relation between the subject and the phallic mother. As Bailly puts it: “the fantasy of possessing the Phallus is too powerful to banish entirely, especially when it is reinforced from time to time by proofs of how very satisfactory the parents find the child” (2009, 84). Between 2006 –when the Spanish Supreme Court made the decision that would later on be known as the Parot Doctrine– and 2013 –when the European Court of Human Rights repealed it– Pedraza had been led to think that they, the victims, actually possessed the Phallus: that they were the most valuable people in the eyes of the law. Spanish political parties and the Supreme Court had made an extra effort to satisfy their demands: they had not only enforced the law, they had enforced it *beyond* the limits of the rule of law. And all that because of their sacrifice and their suffering. They had seen their value recognised and their demands attended to.

The problem, however, is that when it comes to desire and fantasy, no satisfaction is ever truly sufficient. The proof of love, that extra effort that the subject obliquely requires from the Other in order to disclose their relation –‘Who am I for you?’– is intangible: it appears as an inessential part of the demand, justified by the need, the actual object of it, and can never find full satisfaction. Even if the state had side-stepped the rule of law in its application of it, the sentences were still ‘too short,’ and the terrorists were being treated ‘too well.’ The plain application of the law was not enough: they kept needing further proofs of their special status in the eyes of the law, they needed to be reassured that justice would be served, that the wicked would be punished, and, in the end, that ETA would be utterly defeated. That ongoing struggle for higher and higher levels of ‘justice’ kept Pedraza’s hopes alive: it kept alive the fantasy that ETA would be completely defeated.

Her identity, her ego, may have been reconstructed around this fantasy and the constitutive lack at its core: around a fateful narrative of justice with an eternally postponed defeat of ETA meant to confer meaning on the contingency that had dismantled her symbolic universe and changed her life. A fantasy and a narrative structure of fate that carried within themselves the promise of restoring what she had lost once ETA had been defeated. In other words, her identity in the wake of

the 2004 bombings had been built on the promise that attaining her object of desire, the defeat of ETA, would finally grant her The Thing, the object of loss, after her sacrifice.

And yet, attaining the object of desire –the defeat of ETA– that is supposed to restore the object of loss –a sense of wholeness and purpose in life lost as a consequence of the death of Pedraza’s daughter– may not be as appealing as it may seem in the first place since getting it would entail:

a dismantling of the Symbolic. [...] Because the Subject is brought into being by signifiers, and The Thing exists out of the Symbolic realm, absolute jouissance in The Thing would require an exit from the realm of signifiers, which is the realm of subjectivity, and the subject itself would be erased, annihilated. (Bailly, 2009, 139)

In other words, accepting the defeat of ETA after the permanent ceasefire and finding enjoyment in it would have been unacceptable for Pedraza insofar as it would have entailed the disappearance of her own identity: the disappearance of an identity underpinned by her struggle against this group. A struggle that conferred meaning to the loss of her daughter. Defeating ETA may have been her object of desire, but not her object cause of desire: that role was reserved to the extra effort, the caring attitude, displayed by the institutions meant to provide her with meaning and recognition once again. The object of desire sustaining her fantasy, a fateful or even messianic disappearance of the Basque separatist group, had to be eternally postponed in order to be effective: as an imaginary object, it had to remain absent in order to preserve the symbolic function of her fantasy.

Pedraza’s denial of the disappearance of ETA along with her calls for justice during the demonstrations that took place in the aftermath of the repeal of the Parot Doctrine respond to this logic. On the one hand, accepting a non-cathartic end of the struggle against ETA would have forced her to traverse her fantasy and accept the contingent character of her narrative structure. That is, it would have forced her to deny the necessary and fateful character of the narrative that had restored meaning to her life. And, on the other, her demands for justice during the demonstrations in 2013 point not to her object of desire –a messianic disappearance of ETA– but to the object cause of her desire: to the ongoing attention and recognition that she had received from the law since 2004.

Due to the failure in castration caused by law's phallic character, along with the absence of a proper Name-of-the-Father or higher reason capable of ruling over it, the treatment that she had received from Spanish political parties and legal institutions may have led her to think that the law was there entirely for her satisfaction, omnipotent and omniscient, as a powerful part of herself with which she could become identified (ibid. 121-122). Her demands for justice were a call to recover that Otherly enjoyment (*l'Autre jouissance*): a call to ensure the persistence of an attention crystallised in the ongoing approval of ever harder legal punishments. Ultimately, they were an appeal to a principle ideologically –and falsely– embodied by law, and that law itself had ostensibly bestowed upon the victims of terrorism when it decided to trespass its own limits.

Combined, Pedraza's denial of the disappearance of ETA along with her regular calls for justice appear as an attempt to ensure the survival of the narrative structure of *fate* that had turned the death of her daughter into a meaningful loss: into a sacrifice. They appear as the enduring will to preserve the absence of her *imaginary object of desire* so that her object cause of desire and her fantasy may persist: as a *desire to sustain desire*. But also, and this is important, they appear as a way of bending to her will a now fanciful and capricious Other: as the demand for a *Name-of-the-Father* able to reduce and keep in check the *anxiety* caused by law's arguably arbitrary behaviour.

#### *Just enjoyment*

Pedraza wants a law that she can reign over –an omnipotent and omniscient Other completely bound to her will. But, as we saw in the previous chapter, the case of Irene Villa is radically different in this regard: whereas Pedraza wanted to inscribe her pain and her suffering in the law, Villa suspended it through the plain acceptance of its less than perfect functioning. And, in the same way, if we agree that Pedraza's understanding of justice is built on an unquenchable desire to control the law and ensure the persistence of her narrative, Villa's understanding of justice is not defined so much by desire as it is by *jouissance*:

Not as the satisfaction that arises from the attainment of a goal, but a form of enjoyment derived from the usage of something in its legitimate (intended) way. [...] *Jouissance* is

the enjoyment of a sensation for its own sake, and is linked with the death drive, which goes beyond the pleasure principle. (ibid. 118-119)

Just as character, history becomes an excuse for the display of the individuality of the subject and his unique traits, in the case of *jouissance* every goal and every object becomes an excuse for the exercise of a given function in its intended way: *for its own purpose*. For Villa, the enjoyment derived from the overcoming of an obstacle caused by the injuries suffered during childhood –e.g. walking again, skiing, or having children– is not so much rooted in the overcoming of *that* particular obstacle, as it is in the very act of overcoming it. In the same manner, the enjoyment that Villa may obtain from sharing her experiences with others in public talks and interviews is not necessarily dependent on the public she is addressing, but on the very act of sharing her experiences.

This kind of enjoyment, dependent on the act itself rather than its object, leads to a form of *repetition* that presents some similarities with Pedraza's ongoing calls for justice but also stands in stark contrast with it. In the same way that Calvinists see professional success and wealth as a confirmation of their fate –if they have been granted them in this life, that possibly means that God loves them and, in consequence, they are predestined to go to heaven– Pedraza's constant appeals for greater levels of justice and harder punishments stand for a demand for proof: proof that the Other actually holds her in esteem and proof that the fate that confers meaning to her life remains intact. The repetition that we see in the case of Villa – a constant restaging of the contingency that changed her life along with an enduring will to overcome the difficulties derived from it– responds to the logic that connects *jouissance* and the death drive: a logic that, with the overcoming of every obstacle and the attainment of every partial object, always tries to push the sensation a step further.

Unlike what happens in the case of desire, which preserves the symbolic universe –history– of the subject through its unfulfillment and aims to perpetuate itself through the absence of its object, *jouissance* perseveres through its very exercise: having internalised loss and having accepted that no object is truly *the* object –The Thing– it embraces the enjoyment derived from the achievement of every partial object, calling for ever more objects to attain and obstacles to

overcome. An enjoyment that, in stark contrast to pleasure, does not seek to reduce tension but to entice it. The subject makes use of the Symbolic –language and the law– in order to push its limits: in order to annihilate the history that structured his ego up until that point and overcome –or even reinvent– himself as a subject with every new achievement –that is, the death drive. The struggle that may follow the irruption of contingency in the life of the subject is not “endured” for the sake of a given outcome that could stabilise and reaffirm his ego. Making visible the split between the subject of the enunciation and the subject of the enunciated, this type of confrontation appears, as will be explained over the following pages as source of enjoyment in and by itself: as an instance in which the subject is presented with the opportunity to reaffirm a form of subjectivity beyond the symbolic structures constituting his persona.

Villa’s narrative is not structured by fate, but by character. Justice does not appear as a fateful and quasi-messianic ideal whose attainment is awaiting her in the future, the present is not a space of suffering to be painfully endured until the wicked are punished and the just are rewarded in some distant future: it is something that –imperfect and limited as it might be– has already befallen her, something that she enjoys in the recurring experience of the same in every obstacle, in every moment, and in every contingency.

In the same manner, her narrative and her identity are not sustained by desire and its eternally postponed object, but by *jouissance*: not by gaining dominion over the Symbolic, but by understanding its limitations and pushing its limits; not by the attainment of an imaginary object such as a messianic disappearance of ETA, but by the enjoyment of the symbolic function represented by the restatement of her own experiences; not by the need to confirm her fate, but by the enjoyment of her own character; not by the need to preserve a particular identity, but by the will to reinvent it; not by a desire to control the law and find full recognition in it, but by the enjoyment of derived from the constant re-enactment of her subjectivity.

The roles of desire and *jouissance* as opposite poles in both cases (Braunstein, 2003, 102-114) represent entirely different ways of experiencing justice; but even if the contrast between them has been made clear, the origins of Villa’s *jouissance* in relation to her interactions with the law are not as manifest as the origins of



Pedraza's desire. The reason for this is that, as I will argue in the following section, *jouissance* can also be seen as the result of taking the logic of desire to its ultimate consequences. That is, as the enjoyment experienced by the subject of the enunciation once he has traversed the fantasy of his identification with the subject of the enunciated: the enjoyment caused by the realisation that, in spite of his ego, the subject has no firm place in the structure of the law as Other (Zupančič, 2000, 30).

**From symptom to sinthome, from pleasure to *jouissance*, from desire to drive**

The relation with the law in the cases of Pedraza and Villa are remarkably different. And, while the latter seems to have suspended it through sheer acceptance of its imperfect character and functioning, the former has become ever more dependent on it in her striving to gain control over the law.

The definitive experience of the subject of freedom, the subject who believes himself to be free, is that of the lack of freedom [...]. The more she tries to specify the precise moment at which freedom is real, the more it eludes her. (ibid. 31)

While fate unfolds the immense complexity of the guilty person, the complications and bonds of his guilt, character gives this mystical enslavement of the person to the guilt context the answer of genius. Complication becomes simplicity, fate freedom. [...] The character trait is therefore not the knot in the net. It is the sun of individuality in the colourless (anonymous) sky of man, which casts the shadow of the comic action (Benjamin, [1919] 1978, 310-311).

Mutatis mutandis, the quotes by Zupančič and Benjamin could be applied respectively to the cases of Pedraza and Villa: in the former, the more she tries to specify the exact moment at which the law would finally be just, the more it eludes her; and, in the latter, fate –law– becomes freedom through the acceptance of the contingent and less than perfect character of law itself. One of these understandings of justice opposes the imperfection of the law and, by doing so, ends up making the subject even more dependent on it. The other accepts the law *as it is* –necessarily imperfect and contingent– and, by doing so, reduces his degree of dependency on it through an unbinding and rebinding movement that allows the subject to reposition himself in relation to the law.

Perhaps Wendy Brown is correct when she affirms that “desire is not inherently emancipatory” (2001, 46-47). There may be cases where an unquenchable desire for justice that ostensibly challenges the shortcomings of the law results in an ever increasing relation of dependency on it. Maybe in others it is not the “just law” that we may be tempted to seek, but the law which is studied and no longer practiced, that appears as the gate to justice (Benjamin, 2005, 815). We may even entertain the possibility that justice may not be a goal to be achieved but rather an action to be enjoyed in its own right. But, if that is correct, we need to investigate how could it be possible to evolve from an understanding of justice rooted in the false promises of the law to one capable of suspending its authority: we need to investigate how to move from an understanding of justice underpinned by satisfaction and desire, to one marked by *jouissance* and drive; from symptom to *sinthome*; from law to justice. Ultimately, we would have to investigate the logic of suicide –the symbolic destruction and rebirth of the subject driven by *jouissance*– from one pole of the spectrum to its opposite –or, at least, to an intermediate position.

*From symptom to sinthome*

Finding such a stance –one that may allow the subject to confront the shortcomings and false promises of the law while also avoiding the increasing dependency that such confrontation may provoke– is not an easy task. It requires accepting that our particular struggle for recognition is very likely, if not almost certain, to be fruitless. Not because our case, our personal circumstances, our frustration, or our suffering are not worthy of recognition but because such recognition cannot be attained within the limits of an Other for whom such things are not relevant: an Other for whom such things do not even exist. But it not only requires accepting the structural impossibility of attaining justice from the law, it is also necessary to acknowledge that, even if futile, our struggle for recognition may be worthy of recognition in and by itself. In other words, the task of finding a position that could allow the subject to face the structural failure of the law to deliver justice while not falling into the trap of dependency is also the task of unravelling the constitutive lack in the Other: the task of unravelling the symptomatic character of our particular case until we are left with nothing but our *sinthome*.

In Freudian psychoanalysis, the symptom –briefly sketched in Chapter Two– appears as a consequence of repression: as the sign of and as a substitute for an instinctual satisfaction. And that which is repressed in any institutionalised justice system –that is, law– is the possibility of a direct interaction between both conflicting parties: the possibility that a particular subject may decide to take justice in his own hands and take revenge on the offender. However, the object of repression is not the potential damage that a subject could inflict on another, but the possibility that in this process the state itself may lose its monopoly on violence and thus incite future challenges to its authority.

Hence, insofar as it appears as a threat to the state and the authority of the law, revenge constitutes an object of repression. The satisfaction that the subject may obtain from an act of vengeance, however, remains unclear. Revenge is eminently reactive: it sprouts from suffering and is aimed at the person or institutions perceived as responsible for such suffering. Especially in cases in which the subject has suffered severe losses as a result of someone else’s actions, it might be difficult to find words that could convey the depth of his or her agony: an agony that not only threatens to escape the reach of language and thus the sphere of the Symbolic, but that also challenges its very consistency. When suffering escapes description, when its intensity appears as ineffable and threatens to isolate the subject from other human beings who could not possibly understand what he is going through, this very subject may seek to repair his symbolic universe by making himself understood at the site of the Real. That is, he may seek to create a bond with the person responsible for this pain by inflicting an arguably similar –real– pain on that person: he may seek to make himself understandable and understood by making the offender go through an equally painful experience.<sup>101</sup>

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<sup>101</sup> The problem is, of course, that insofar as the depths of such suffering are unfathomable to the subject himself, there are no limits to the suffering that we may want to inflict on the person that we perceive as responsible for it:

(Seekers of justice). There are those who, if science ever made it possible, would like to extend the lifespan of criminals by up to 1,000 years, so they could serve 1,000 years in prison. Wasn’t it God who did that when he founded eternity, so the damned could eternally suffer in hell? (Sánchez Ferlosio, 1993, 127, my translation).

In this regard, even if the law of Talion –“an eye for an eye”– is widely considered as a vengeful practice it also appears as a significant development aimed to restrain the punishment inflicted on the perpetrator to the kind and degree of injury suffered by the victim.

In other words, the satisfaction that the subject may hope to attain from vengeance is nothing other than full understanding and recognition from the offender. The structural limits to the possibility of obtaining such recognition from offenders are worth further discussion but go beyond the scope of this chapter. However, it is worth noting that regardless of such limits, seeking direct recognition from offenders by means of vengeance is precisely what is repressed by law in order to preserve its authority. And, as a result of that repression, the subject may seek an alternative source of recognition: a substitute Other. That is, the law.

Under the threat of punishment, the subject seeks in the law the recognition that he “cannot” obtain from the person or institutions at fault for his suffering. Hence if we consider for a moment the case of Ángeles Pedraza in the light of the paragraphs above, we could arguably say that what is symptomatic about her as a subject is her relentless demand for justice: she seeks not only to be recognised as a valid interlocutor –citizen, speaker of the language of the law– but also to see her suffering recognised by the law as a substitute Other. She seeks to see the ineffable Real of her suffering recognised in and by the law. And, ultimately, it is the hope for this –imaginary– full recognition in the law that binds together the Real of her experience and the Symbolic of her role as citizen, thus constituting her symptom.

Undoubtedly, there are limits to the extent to which we can study the cases of Villa and Pedraza by means of psychoanalysis: even if we consider them as symptomatic of a broader political and social reality, they are not patients. And even if they were, the use of an intimate knowledge of their cases and their experiences for the purpose of illustrating a broader discussion on the relation between law, justice, and subjectivity would raise severe ethical concerns. With these caveats in mind, if we agree to proceed with the psychoanalytic allegory we could arguably say that this study aims –albeit in a necessarily limited and flawed way– to unravel the symbolic component of the symptom: to make visible –although not necessarily *seen*– the fundamental lack in the law as Other –its structural incapability to provide

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Also, it may be argued that any form of understanding or recognition must necessarily take place within the domain of the Symbolic. However, it should be noticed as well that according to Wittgenstein’s *Philosophical Investigations* ([1953] 1967) communication and understanding only became possible insofar as there are “shared experiences.”

the subject with justice— through the scrutiny and demarcation of its constituent limits. As in Lacan’s Taoist metaphor of the jar in *The Ethics of Psychoanalysis* (1992, 120-123), it aims to elaborate a symbolic constellation capable of delineating the location of the Real of the drive in the subject: his struggle for full recognition in the name of justice, and the impossibility of obtaining it from a law —an Other— that is just as lacking as the subject himself.

If this point is reached, if the constitutive lack in the Other is made visible, the subject is faced with something that he could not or did not want to see, even if only at an unconscious level: the possibility that the justice that he sought may be impossible to attain within the law. Ultimately, the subject is faced with a choice: either accepting this possibility and embracing a form of jouissance that he had previously refused, or persisting in his refusal. Either he accepts that the full recognition that he hoped to find in the law is impossible to obtain and thus seeks supplementary forms of recognition, or he refuses to acknowledge the structurally flawed character of the law and persists in his struggle to purge from it its imperfections so that “true absolute justice” can be achieved within its limits.

As Verhaeghe and Declercq (2002, 59-83) put it, in the end the subject has to choose between becoming identified with his symptom or believing in it. To believe in one’s symptom is to believe in the existence of a final signifier —a perfect and absolutely just law— capable of disclosing the ultimate meaning of the Symptom of the subject —capable of providing him with full recognition and understanding. That is, the belief that in spite of its current and apparent shortcomings, the law is not structurally flawed and can be perfected —through endless calls for ever harder punishments— to the point of actually being able to provide the subject with the full recognition that he so desires. Identifying with one’s symptom, on the other hand, is tantamount to becoming identified with one’s own particularity: with the fact that the failure of the law to recognise it is not a matter of impotence, weakness or corruption, but a structural impossibility. Namely, an identification *of* the Real of the law —its constitutive lack— and *with* the Real of the subject himself: a real identification *with* his drive —his particular form of enjoyment, his singular struggle for recognition, and ultimately his sinthome, the real foundation of the subject left behind after unravelling the symptom. An identification that supplements the lack in the Other through partial and alternative forms of recognition arising from the

very struggle of the subject to obtain it, leading to a form of *jouissance* that is “situated in the Real of the body” (ibid.): in the radical particularity of the subject that the law could not acknowledge; in the specificity of his circumstances and experiences rather than in his role as citizen; in his particular struggle for recognition rather than in the recognition that he may have hoped to obtain from the law.

*From satisfaction to jouissance*

Becoming identified with our *sinthome*, finding self-recognition in one’s own struggle for recognition without expecting full recognition from the Other, represents a turning point. The subject ceases to await justice to befall him and, instead, finds it in the very act of making visible its absence. Giving up on the possibility of obtaining satisfaction, the subject finds enjoyment in the very strife necessary to achieve that impossible goal. As in Nietzsche’s metaphor of the sand castles ([1873] 1998, 61-63), instead of expecting to find satisfaction in the achievement and endurance of his ultimate goal, the subject becomes like the child who finds joy in the very process of building them only to see them undone moments later.

In forsaking the possibility of finding full satisfaction for his desire the subject also gives up on his ego. Or, at least, on the way in which his ego had been structured up until that point. He ceases to cling to a particular form of being<sup>102</sup> and embraces Being<sup>103</sup> in an intransitive way: as a form of becoming. Metaphorically speaking, the subject who believes in his symptom and thus expects to receive full recognition or absolute justice from the law is like a person who has suffered a severe injury but does not want it to leave a scar on his skin: he wants to stay the same as before, so the moment the injury begins to heal he starts scratching and digging at the scab out of fear that it will leave a scar behind. And, in the process of trying to prevent the appearance of the scar, that wound grows bigger and bigger while never finishing to heal. The subject who becomes identified with his symptom, on the other hand, is like the person that accepts that that wound will

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<sup>102</sup> As *Seiende* (Heidegger, [1927] 2010)

<sup>103</sup> As *Sein* (ibid.)

necessarily leave a scar –that his skin will look different than it was, that he will never be the same as before.

As with any form of becoming, this process entails the acceptance of a loss and even mourning it. But as Judith Butler puts it:

Perhaps mourning has to do with agreeing to undergo a transformation [...] the full result of which one cannot know in advance. There is a losing, as we know, but there is also the transformative effect of loss, and this latter cannot be charted or planned. (2004, 21)

The passage from satisfaction to jouissance –from the belief in the symptom to our identification with it– and the acceptance of the loss of the Thing requires not only accepting that we are not who we were, but also that we may not be(come) who we are at this moment. It requires accepting being strangers in our own house (Zupančič, 2000, 23).

#### *From desire to drive*

Insofar as the subject believes in his symptom and expects satisfaction, he is also persisting in his desire: in his wish to be fully recognised by the law qua substitute Other. In this endeavour, and continuing with the previous metaphor, the subject perseveres in the belief that it will be possible for his wounds to heal without leaving a scar behind: he continues to believe –and wish– that he can return to a previous state. He desires to return to a state, a symbolic universe, which had been the foundation of his very identity until it was turned upside down by the actions of others. And, in doing so, the subject not only persists in his wish to “stay, awaken the dead, and make whole what has been smashed” (Benjamin [1940] 1970), but also in his wish to remain unchanged: his wish to be the same person that he used to be before the universe that conferred him his identity was undone. In other words, he clings to a particular form of being, to his ego –and to the possibility that through its recognition by the Other it may actually be preserved, as in the case of Ángeles Pedraza.

Thus the desire for justice of this subject appears as “a defence [*défense*], a prohibition [*défense*] against going beyond a certain limit” (Lacan, 1989, 332), keeping alive his ego even if only in a ghostly fashion: as the hope that it might yet be possible for it to return. Going beyond this limit, mourning and accepting that

loss, identifying the symptom and the scar as one's own, is tantamount to doing away with both: that particular ego and its spectre. Going beyond this limit is accepting the loss of the self and, ultimately, committing a symbolic suicide. It is the annihilation of the ego for the sake of the subject. It is standing on the threshold of becoming and the death drive.

This is the transformative effect of loss: what comes after “cannot be charted or planned” (Butler, 2004, 21), but whatever it may be, it will not be the same as before. Accepting this is being willing to give up one's object of desire for the sake of one's object *cause* of desire: it is being willing to renounce the (im)possibility of obtaining full recognition from the law and recognising oneself in the very act of demanding it, making visible the lack in the Other. It is forsaking the (im)possibility of *receiving* justice from the law and, instead, doing justice to oneself in the very act of *speaking* it, in the very act of making visible its absence, as in the case of Irene Villa.

Putting it differently, in Heideggerian terms, the subject's passage from desire to the death drive, from satisfaction to *jouissance*, is also his transition from “expectation” (*Erwarten*) to “anticipation” (*Vorlaufen*):<sup>104</sup> for him, what matters the most about his demand for justice is not what he may obtain from it –the kind of recognition that he would like to receive from the Other– but the very act of demanding justice and laying bare the limits of the law in this regard. It would be positive if his particularity received some form of recognition from the Other, but he harbours no expectations: it is the very fact of demanding such acknowledgement, the fact of recognising that one's own particularity is worthy of recognition, that moves him.

However, the subject who commits this form of symbolic suicide, who renounces his ego, does not repudiate his past. On the contrary, his previous life, his experiences, and the scars left behind on his skin are part of who he is now. The subject articulates his past historically: not recognising it in ‘the way it really was’ but reappropriating it in a different light (Benjamin [1940] 1970). The scars he wears do not appear anymore as wounds but as the living testimony of past experiences, and every new contingency, every new obstacle, every new struggle

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<sup>104</sup> These concepts are studied in further detail in Chapter Five.



becomes an excuse for the subject to rearticulate them and reaffirm himself in the recognition of his own particularity.

His ego is transformed with the overcoming of each obstacle, destroyed and created anew from the ashes of the previous one. In the passage from desire to the death drive, the subject no longer identifies himself with the hope of being made “whole” again in some distant future but with its very opposite: with the acceptance that he is not the same person that he used to be, and that he will not remain the same person that he is at this moment. In this passage he does not cling anymore to a particular form of being, but rather to the real of being as such: to the fact that he *just-is*.

*From fantasy to the ethical act*

In this manner, justice always appears limited: either the subject awaits *ad eternum* for the law to grant him an absolute and quasi-messianic justice that in no manner it can provide, or he settles for partial and smaller “victories” –finding enjoyment in the very *act* of fighting those battles for recognition:

The act differs from an ‘action’ in that it radically transforms its bearer (agent). After an act, I am not the same as before. In the act, the subject is annihilated and subsequently reborn (or not); the act involves a kind of temporary eclipse of the subject. [It is] therefore always a ‘crime’, a ‘transgression’ – of the limits of the symbolic community to which I belong. (Zupančič, 2000, 83)

The first part of this quote from *Ethics of the Real* resonates with what has been discussed above. However, Zupančič’s description of this “logic of suicide” as a crime or as a transgression offers the possibility of rethinking the relation between this ‘suicidal’ subject and the law from a different perspective: the return of the – politically– repressed.

It was said above that the object of repression of the law is the possibility that a subject may take justice into his own hands. Not because of the damage that this particular subject could ostensibly cause, but because it would threaten the state’s monopoly on violence. This form of prohibition responds to the logic of what Walter Benjamin defined as “law-preserving violence” ([1921] 1996), and is particularly severe in its application in those cases in which breaking the law is not

a mere side-effect of an action meant for the achievement of other goals –e.g. theft– but the sole purpose of such transgression: sedition, treason, terrorism, insurrection, etc. It is particularly severe in those cases in which the goal of the transgression is, in the end, to call into question the very authority of the law.

Hence Zupančič's account of the act as a transgression may not be too far-fetched after all: the authority of the law is called into question and its inability to provide justice is made apparent the very minute the subject (1) publicly renounces any expectations of finding satisfaction in the law and (2) invests himself as an alternative source of recognition by declaring that his only purpose is to expose the contradictions and limitations of a law that is structurally flawed.

The conceptualisation of justice as an act rather than as a goal to be achieved within law represents an “a-legal” –or at least, “non-illegal” – questioning of legality insofar as the subject chooses to speak the discourse of the law only to dismiss its validity: both as a place for recognition and as a meaningful Other. It represents a form of interaction with the law in which the latter is thoroughly studied, but no longer applied.

### **Conclusion**

This chapter aimed to investigate the unconscious mechanisms behind the production of the narratives of justice described in Chapter Three. The first step was to make visible the gap between the ideological functioning of the law and its actual enforcement. A gap that, through an allegoric use of Lacanian psychoanalysis and the study of the triad need-demand-desire, allowed us to see how the peculiarities of the law as Other may affect the emergence of subjective understandings of justice: the way in which they may affect the appearance of the desires underpinning the abovementioned narratives and understandings of justice. In this regard, it was argued that the law presented a series of characteristics in its relation with the subject that resembled those of the Phallic Mother. This chapter also defended the hypothesis that these characteristics of the law lead to a failure in the symbolic castration of the subject that makes visible the differences between the emergence of desires for justice and other forms of desire. More particularly, it argued that the resemblance between the law and the Phallic Mother, stemming from the abyss between its ideological façade of justice and its actual application,

may allow for the formation of the Hypothesis of the Phallus –there seems to be something capable of catching the eye of the law– but not the Name-of-the-Father –it being impossible to find a clear reason for an ostensibly whimsical behaviour in which the law seems to obey no designs other than its own.

Following these discoveries, and making use once again of the cases of Ángeles Pedraza and Irene Villa, the last part of this chapter argued that the unconscious mechanisms driving the production of subjective narratives of justice oscillate between *desire* –with justice as an imaginary object of desire with the potential to make the subject whole again but whose attainment is eternally postponed into the future– and *jouissance* –entertaining the possibility such a thing as an ultimate or absolute justice may not exist, justice does not appear as the result of a struggle towards it but as the struggle itself, allowing the subject to find recognition not in the attainment of justice as an imaginary object of desire but in the very act of demanding it.

## CHAPTER FIVE

“When the Man Comes Around”:

Justice after (and beyond) Judgement

And killing time is perhaps the essence of comedy, just as the essence of tragedy is  
killing eternity.

(Miguel de Unamuno, *San Manuel Bueno, Mártir*)

While the previous two chapters considered contingency and desire as two key dimensions in the formation of subjective understandings of justice, the final part of this block will centre its attention on temporality: on the differences between the temporalities of law and justice, and the different ways in which time can be experienced as a result of a particular understanding of justice emerging from a missed encounter with the law. Roughly speaking, while the study of contingency and desire sought to describe the *emergence* of subjective understandings of justice –the circumstances in which we start talking about justice and the role played by this concept in a series of meaning-making processes– and their *development* –the mechanisms that underpin such processes and appear in response to the impossibility of finding justice in the law– this chapter seeks to cast some light on the *outcome* of such understandings: What is justice *for* the subject demanding it? What does it mean *for* the subject? What does it take *for* the subject to feel that justice has been served?

This is not to say, however, that temporality itself appears as a result of a meaning-making processes born from our discontent with the law and driven by unconscious mechanisms that may range from desire to jouissance. In the same manner that a subject may have a narrative of life prior to an encounter with political violence or other forms of contingency, and in the same manner that a desire other

than a desire for justice may not require the interaction with the law in order to appear, the subject is always-already immersed in a form of temporality: in a certain experience of time resulting from the symbolic structures that he inhabits. And just like the narratives and desires of a given subject may be transformed through the processes studied over the last two chapters, such experiences of time may also be altered through the irruption of disruptive contingencies in the life of the subject, the interactions with the law that may follow them, and the subsequent realisation of the shortcomings of the law.

The relation among these three dimensions of analysis will be discussed in further detail in the Interlude following this chapter. For the time being, however, there is another issue that requires our attention: the role of the particular subject in our present analysis of the temporality of justice.

This entails, to a certain extent, a return to the origins of this research project: a return to the Unamunian “man of flesh and bone” and the way in which this subject –“the man who is born, suffers and dies –above all, who dies” (Unamuno, [1913] 1972)– experiences time. Hence this chapter will study the way in which the temporality of the subject differs from the linear conception of time derived from the normative character of the law, as well as the form in which such subjective experiences of time can appear connected to one understanding of justice or another –with the potential to question the authority of the law and the limits of its power. A form of questioning that, as I will argue over the following pages, can assume a range of forms within a spectrum delimited by two distinct readings of the song giving its name to this chapter: a messianic interpretation in which justice can be seen as the outcome of a “final judgement” awaiting us in the future; and a second one, in which the expression “to come around” is not read as an allegory to the return of the messiah and the coming of the Kingdom of God, but as “regaining consciousness”: as becoming aware of the gap between subject and citizen – between actor and role.

Nevertheless, considering that the study of the temporality of justice brings an end to this research project, it may be advisable to recapitulate and clarify the relation between this chapter and work done so far before going any further. In the first place, and taking “the man of flesh and bone” as its departing point, this

research sought to study how a particular subject, who goes before the law hoping to attain justice, can come to develop a subjective understanding of justice as a result of this interaction. The second chapter deepened into this issue, arguing that the abovementioned subjective understandings of justice emerge from an encounter with the constituent limits of the law: subjectivity, contingency, and justice itself. Limits which, in turn, became visible in the light of generality and normativity as law's defining features.

The next step, however, was to study the different ways in which such encounters could lead to the production of new understandings of justice: having located the constituent limits of the law, the point at which such understandings of justice may arise, it was necessary to investigate the process leading up to their production. For that purpose, the second chapter also identified three dimensions to be considered in their development: contingency, desire, and temporality. The second block of this project was devoted to the study of each of these dimensions. Consequently, Chapter Three put emphasis on the differences between the role of contingency in law and in the subject's own narrative of justice, positing Walter Benjamin's concepts of *fate* and *character* as opposite ways of articulating contingency in such narratives. Chapter Four, on the other hand, sought to investigate the role of *desire* and *jouissance* in the production of the abovementioned narratives and how, in turn, they seemed to appear as two possible ways of understanding justice in view of the less-than-perfect character of the law. Finally, and completing this triad, Chapter Five aims to clarify the differences between the temporalities of law and justice while also using Heidegger's notions of *expectation* and *anticipation* –in correspondence with the two readings of the song mentioned in the previous paragraph– as opposite ways of conceiving justice in terms of temporality.

This structure establishes clear boundaries between chapters: the first one located a blind-spot in the study of justice around “the man of flesh and bone” that allowed for the second chapter to build upon it the theoretical basis for this project. Each of the following chapters was devoted, in turn, to the study of a clearly defined topic: contingency, desire, and temporality. Nevertheless, these three dimensions are not completely isolated from one another. And, while throughout the previous two chapters it was already possible to see a certain degree of reciprocity between

the studies of contingency and desire, the same occurs with our present analysis of the temporality of justice.

The basics for the study of this topic appeared outlined at the end of Chapter Two, making visible the chronological character of the law, and describing the temporality of justice as its opposite: Kairos. Later on, the question of temporality also permeated the study of contingency and desire. At the level of contingency and the production of narratives of justice, the concepts of fate and character already suggest two different ways of understanding the temporality of justice: either conferring meaning to contingency on the basis of a fateful and quasi-messianic justice located in an eternally-postponed future, or through a narrative of character resulting in a permanent and recurring experience of the same. Similarly, desire and *jouissance* made way for two possible and diverging ways of conceiving justice: either as an imaginary object of desire that must remain perpetually absent in order to preserve the symbolic function of the narrative built around it, or as the enjoyment derived from the very act of demanding justice –and making visible the inability of the law to uphold its ideological promises of justice.

Hence the three dimensions considered here –contingency, desire, and temporality– appear interlocked, as three ecstases standing out from a common underlying ground or as three aspects of the same phenomenon: justice and the way in which it comes to be understood by a particular subject. The introduction of the concepts of *expectation* and *anticipation* (Heidegger, [1927] 2010) in this chapter aims to complete and refine the study of these three dimensions, establishing a parallelism with the concepts of *fate* and *character* on the one hand, and *desire* and *jouissance* on the other. Hence this chapter will include (1) a description of the differences between the temporalities of law and justice, (2) and an introduction of the concepts of expectation and anticipation as opposite poles of the same spectrum in the study of the temporality of justice –which paves the way, in turn, for the analysis of the relation between contingency, desire, and temporality developed in the Interlude following this chapter.

## **Kairos rebelled, Chronos shrunk: the temporality of law and justice**

In the same manner that the study of desire and subjectivity appeared linked to the general character of the law and its inability to put any “extra effort” into the satisfaction of the demands for justice presented by a particular subject, the study of its temporality appears closely related to another of its basic features: normativity.

Unlike the laws of physics, which aim to describe universally observable phenomena, legal norms are inherently prescriptive: they impose or forbid certain behaviours. This entails that such behaviours are neither impossible nor necessary, but purely contingent. For instance, if it were impossible to kill other people, there would be no reason to make murder illegal; and, in the same manner, if all human beings must breathe in order to live, imposing “breathing” as a legal obligation would be unnecessary and redundant. Attempting to impose or forbid necessary or impossible actions by law would either transform law itself into a purely descriptive phenomenon or into a set of norms that would lack any form of enforceability, rendering it useless in the end.

Disobeying the law needs to be possible insofar as only the act of breaking it makes room for its enforcement: only the act of breaking the law can make apparent its regulatory function. In stark contrast with the law of gravity or the laws of thermodynamics, legal norms must be susceptible of being broken if they are to retain their enforceability. But this too has an effect on the way in which the law produces its own temporality: on the one hand, the past escapes its reach due to its irreversible and thus necessary character;<sup>105</sup> and, on the other, the rule of law also excludes the possibility of making *ad hoc* judgements –being possible to pass a law *on the basis* of a case but not *for* a specific case.<sup>106</sup> Hence its regulatory capacity is

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<sup>105</sup> Ostensibly, some laws and legal institutions such as the Historical Memory Law (Spain), the National Commission on the Disappearance of Persons (Argentina) or the Truth and Reconciliation Commission (South Africa) could appear as exceptions to the impossibility of the law to regulate the past. Nevertheless, and regardless of the social and political value of such initiatives, the reach of their power is limited to the possibility of presenting past events in a different light –that is, without ever being able to undo what has been done nor to change the fact that such events actually happened.

<sup>106</sup> In this regard the Nuremberg Trials appear as *the* exception to this general prohibition. The study of the relation between the Nuremberg Trials and the three dimensions of analysis considered here would require a separate piece of work on its own right.



ultimately restrained to the future. It rules future actions on the basis of past experiences, creating mediation between them that entails a certain blindness towards the particularity of the present in which its intervention is required.

The law gives prominence to and establishes a mediation between the past and the future which reflects, in turn, the chronological character of its temporality. In law time is presented as pure sequentiality: as a succession of moments in which the present always stands as the future of a past and as the actualisation of a near future, as the missed encounter between a “not yet” and a “too late” in which legal norms can be enforced back into existence. The law may very well rule the future on the basis of the past, but its enforceability becomes actual enforcement in the present and only in the present. Consequently, the latter plays a rather ambiguous role in the temporality of law: on the one hand, it appears as the ecstase of time that sustains and guarantees the very existence of the law; but, on the other, its radical particularity also escapes its domain. Each moment, each present, appears as necessary as it appears devoid of content: a mere excuse for the enforcement of legal norms, regardless of the particularity of the case and the subject demanding their application. Time itself becomes “homogeneous” and “empty” (Benjamin, [1940] 1970). Every single moment and every single case is seen in the light of past cases and considered as a precedent for future ones. Each of them is treated as equivalent to any other, deprived of the particularity of experience that could make them meaningful for the subject who goes before the law hoping to attain justice.

Arguably, this impasse resonates with the work done in the previous two chapters. Just like the indistinct legal treatment given to each contingency gave origin to the production of subjective narratives of justice, and just like the consideration of each demand for justice as the demand of “just another citizen” made way for the appearance of particular forms of desire and *jouissance*, the disregard of the law for the present in which justice is required also entices the emergence of alternative forms of temporality. Justice “doesn’t wait [...] a just decision is always required immediately. [...] the moment of decision, as such, always remains a finite moment of urgency and precipitation” (Derrida, 1990). Considering *my* case as equivalent to any other cases that may have been judged so far is not enough. Treating *my* case as a mere precedent for future cases is not enough. Justice demands it to be recognised as *mine* here and now.

And while the temporality of law functions in a strictly sequential manner, the temporality of justice adopts the form of a time-lapse, a window of opportunity arising from the missed encounter between a “not yet” and a “too late” that requires to be recognised in its most radical particularity. Or, to put it differently, whereas the temporality of law takes the form of *Chronos*, the temporality of justice adopts that of *Kairos*: an instant of timefulness and timelessness in which everything happens and an opportunity may be seized. A kind of temporality that appears in stark contrast with that of law in its pure immediacy, differentiable from it insofar as it appears as a present that demands to become meaningful in and by itself – instead of being subordinated to the past and the future. However, this only accounts for the way in which the temporality of justice becomes apparent and distinct from that of law: the form in which such temporality can be experienced by the justice-seeking subject is an entirely different matter.

#### **“When the Man comes around”: expectation and anticipation**

Besides his musical accomplishments, Johnny Cash was also known for his strong religious beliefs. And more than any other, “The Man Comes Around” stands as a symbol of the deep influence of such beliefs on his work. The very title of the song along with its numerous biblical references appear, in principle, as a clear allusion to the apocalypse and the second coming of Christ: as a reference to a fateful and messianic future in which the wicked will be punished and the just will be rewarded. However, this song is also open to a second reading insofar as “to come around” can be understood not only as a form of “return” or “recurrence,” but also as the act of regaining consciousness. Hence the two possible interpretations of this song in the context of this research: on the one hand, it can be seen as a reference to a future in which the messiah will come for a second time, making a final judgement that will finally deliver justice and set things right; but, on the other, “when the man comes around” can also be read as “the man of flesh and bone” recovering consciousness of himself in his pursuit of justice.

This “man of flesh and bone” –identified in this thesis as the particular subject who goes before the law seeking justice– is described by Miguel de Unamuno in *The Tragic Sense of Life* as “the man who is born, suffers and dies –above all, who dies; the man who eats and drinks and plays and sleeps and thinks and wills; the

man who is seen and heard; the brother, the real brother” ([1913] 1972). In Unamuno’s work, death stands as the end of life but also as a constitutive element of it: life itself is agony, we are dying from the very moment we are born, and we suffer because of this insofar as there is nothing more human than wanting not to die, than wanting to live forever. And yet, the fact that we are all doomed to die is what gives meaning to our existence. In other words, it is our experience of time and its existential finitude that makes our lives meaningful and worth living. A more nuanced –although less intimate– version of this argument can be found in Martin Heidegger’s *Being and Time* ([1927] 2010). Heidegger also identifies time –and ultimately death– as that which completes and allows us to understand our existence. For him, however, these are concepts that present us with a series of theoretical and even existential problems insofar as (1) we cannot die someone else’s death and (2) we cannot actually experience our own death.

The first of these points entails that for as long as we live we may also bear witness to the passing of others, but experiencing “their death” is something entirely different. We may be “there” when they die, but we cannot die in their stead; and, in the same manner, no one else can die “our death.” This is what Heidegger means when he says that death is one’s ownmost possibility: no one can truly experience someone else’s death. However, this does not imply we can *only* experience our own death. Echoing Epicurus, Heidegger argues that even our own death is excluded from our experience: once death occurs to us, once it becomes actual, we cease to be. We may very well die, but we cannot experience death as such. Hence Dasein –*mutatis mutandis*, the Heideggerian equivalent to “the man of flesh and bone”– can only relate to its own death as an unavoidable possibility that entails the end of everything else: “as the possibility of the impossibility of existence in general” (ibid, 251). If “the man of flesh and bone” is above all the man who dies, Dasein’s existence is equally affected by death and the experience of time resulting from its inevitability. As one’s innermost particularity and as one’s ownmost possibility, death puts life into perspective casting a new light on Dasein’s being-in-the-world: shaping the way in which we perceive our own past and project ourselves onto our surroundings. In other words, it constitutes Dasein –“the man of flesh and bone” – as a being-towards-death.

However, this being-towards-death can appear in two different modalities that reflect the two readings of “The Man Comes Around” discussed above, and also two diverging ways of conceiving the temporality of justice: “expectation” (*Erwarten*) and “anticipation” (*Vorlaufen*).

### *Expecting justice*

In the first of these modalities Dasein confers meaning to its own existence on the basis of something other than itself:

The publicness of everyday being-with-one-another “knows” death as a constantly occurring event, as a “case of death.” Someone or another “dies,” be it a neighbour or a stranger. People unknown to us “die” daily and hourly. “Death” is encountered as a familiar event occurring within the world. As such, it remains in the inconspicuousness characteristic of everyday encounters. The they has also already secured an interpretation for this event. The “fleeting” talk about this which is either expressed or else mostly kept back says: One also dies at the end, but for now one is not involved. [...] “Dying” is levelled down to an event which does concern Dasein, but which belongs to no one in particular. [...] Dying, which is essentially and irreplaceably mine, is distorted into a publicly occurring event which the they encounters. (ibid, 243)

In expectation Dasein struggles to imagine the actualisation of “the possibility of the impossibility of its own existence.” Its own death comes to be perceived as an external phenomenon, as “just another case of death”: How does it feel not to be? How will they remember me? Will they have the same thoughts that I always have when I go to a funeral? Grounded in actuality rather than in possibility, expectation turns death into an event awaiting us in the distant future –instead of something that could potentially occur at any moment as soon as we are born. In expectation, the subject sees himself as “another,” distancing himself from his most radical particularity.

If time –in its existential finitude constituted by death– stands as the kernel of the being of the subject, as its most radical particularity, temporality appears as the way in which it can be experienced –and thus as the way in which the subject can confer meaning to its own existence. The moment one’s death comes to be perceived as an external phenomenon rather than as something constitutive of one’s

existence, the meaning of the latter becomes dependent on an event located in the future that we must await and yet never experience.

In relation to the study of temporality as the third and final dimension in analysis of the formation of subjective understandings of justice, it is also possible to establish a connection between expectation, the first reading of “The Man Comes Around,” and the case of Ángeles Pedraza. On the one hand, expectation appears connected to the first reading of the song insofar as the second coming of the messiah stands as *the* future event that we must await: as the event in which God will finally set things right and confer true and everlasting meaning to our flawed earthly lives. But, on the other, it can also be connected to the case of Ángeles Pedraza inasmuch as her dissatisfaction with the flaws of the law along with her view of the death of her daughter as a sacrifice results in an understanding of justice that acquires equally messianic proportions. In her narrative of fate, justice appears as *the* future event that could validate and make meaningful the death of her daughter: as an event whose actualisation, nevertheless, depends on an Other and requires the complete and total disappearance of ETA – a disappearance eternally postponed and displaced onto the future but also required by the past, by the sacrifice of her daughter. However, if such disappearance ever became actual, Pedraza’s narrative –along with her identity as the embodiment of a police-based approach to the fight against ETA– would also reach an end. Thus her narrative, the very meaning of her existence in the wake of the bombings, appears dependent on a future event that she awaits but may arguably never experience as such.<sup>107</sup> An event that, for her, only the law can deliver. And, as a consequence of this, the very possibility of justice, the thing that could finally offer full recognition to the radical particularity of her experience, is handed over to the law. The meaning-making process embodied by her narrative becomes not only dependent on the future event that would finally fulfil her destiny –the complete and total disappearance of ETA in exchange for the sacrifice of her daughter– but also –and arguably more importantly– on the “they” that she hopes will deliver it: law.

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<sup>107</sup> Similarly to Heidegger’s analysis of Dasein’s existence and death, it is the very absence of that event which sustains Pedraza’s narrative: as long as justice remains a mere and distant possibility, it also retains the capacity to confer meaning to her existence; however, if such justice ever became actual, the entire narrative built around the possibility of attaining it would crumble.

### *Anticipating justice*

In anticipation, on the other hand, Dasein becomes capable of conferring meaning to its own existence on the basis of its ownmost possibility –its death– and only on the basis of this possibility. In other words, it appears as a mode of temporality –an experience of time– that allows Dasein to step out of its daily presuppositions and assumptions about the world –the “actuality of its everydayness”– and become aware of its own potentiality-of-being. An awareness of the ways in which the subject interacts with his surroundings, of the finite and contingent character of such interactions, and also of the alternatives opened by such realisation. In anticipation:

Dasein discloses itself to itself with regard to its most extreme possibility. But to project oneself upon one’s ownmost potentiality of being means to be able to understand oneself in the being [Sein] of the being [Seienden] thus revealed: to exist. Anticipation shows itself as the possibility of understanding one’s *ownmost* and extreme potentiality-of-being, that is, as the possibility of *authentic* existence. [...] Death is the *ownmost* possibility of Dasein. Being toward it discloses to Dasein its *ownmost* potentiality-of-being in which it is concerned about the Being of Dasein absolutely. Here the fact can become evident to Dasein that in the eminent possibility of itself it is torn away from the they. (ibid, 251-252)

In contrast with expectation, anticipation does not appear as a continuous state of mind but as a sudden burst of existential conscience in which the subject becomes aware of his own being. In anticipation Dasein unbinds itself from the they: instead of becoming dependent on the actualisation of a future event that could give true and everlasting meaning to its being, Dasein takes responsibility for it –or, as Heidegger puts it, becomes guilty of it– assuming any possible consequences derived from its actions. In the understanding of its most radical particularity, Dasein becomes capable of tearing itself away from the they, showing reticence towards idle talk –e.g. since everyone dies at the end but for now one is not involved, there is no need to take care of it yet– and estranging itself from its own everydayness –that is, calling into question and reflecting on its previous assumptions and presuppositions about the world. In other words, anticipation provides the subject with a degree of awareness of his own transience that puts into perspective his particularity of experience; and just like his death is his own and no

one else can die on his behalf, his actions are his responsibility and only his to experience –regardless of their final outcome.

As a mode of temporality, anticipation does not appear as the awaiting of a future and final event but as the constant projection of oneself onto the future. That is to say that unlike what occurs with expectation, where the subject strives and is even willing to make sacrifices *in order to* achieve a particular and clearly established goal –e.g. the complete and total disappearance of ETA in such and such manner– in anticipation the subject does not engage with the world solely on the basis of attaining this or that particular result but on the basis of –and for the sake of– the action itself and what it means *for* the subject. Whereas in expectation every action is subordinated to a higher and final goal, in anticipation any result of the intended action is accepted as “the price” that one must –and is willing to– pay for it.

And, just like expectation could be related to a messianic interpretation of “The Man Comes Around” and the case of Ángeles Pedraza, this account of anticipation can also be connected to the second reading of this song and –to a certain extent– to the case of Irene Villa. Translating Heidegger’s lexicon into the terms used in this research project, disclosing oneself to oneself with regard to one’s most extreme and ownmost possibility entails, in the end, becoming aware of one’s most radical particularity. Anticipation allows the subject to become aware of the particularity that escapes the grip of the law and makes him *that* subject and not just *any other* subject. It appears as the mode of temporality of justice in which the subject comes to perceive himself as a particular subject and not just as “another citizen:” as subject of the enunciation and as subject of the enunciated; as the subject who demands justice, and not just as the citizen that appears in the demand for justice.

As explained in previous chapters, the law cannot account for this kind of particularity since the justice-seeking subject only becomes legally relevant in his role as citizen. In this case, anticipation appears as the realisation of such impossibility: as the momentary realisation of the limited capacity of the law to articulate the particularity of the subject in a meaningful manner. A limitation that, once made fully visible, may lead the subject to take responsibility for himself as

well as for any possible outcome derived from his actions, allowing him to realise that the law cannot understand –and hence, cannot confer meaning to– what one is going through because it cannot experience what one experiences. On the one hand, the realisation of this incapacity plays down the importance of the possibility of attaining final and ultimate justice from it. But, on the other, the realisation that the subject demanding justice and only the subject demanding justice can truly understand the full complexity of what he is experiencing also turns the very act of demanding justice into a certain form of justice. It transforms the act of demanding full and universal recognition for one’s most radical particularity into a partial act of full recognition in and by itself. “Partial” insofar as it cannot deliver ultimate recognition since the subject –along with perception that he may come to have of himself– is necessarily transformed by the act of distancing and de-distancing himself from his role as citizen; and “full” insofar as only the subject himself can fully comprehend the full extent of his own particularity. In other words, anticipation as mode of temporality does not transform our experience of justice into the necessary consequence of a legal judgement, nor into something that we must await indefinitely, but into something that we do and, in turn, transforms us into who we are.

### **Conclusion**

Considering the differences between the temporalities of law and justice, this chapter defended the claim that while in the case of law time is experienced as pure sequentiality –as a succession of empty and homogeneous moments in which every present appears as the future of a past and as the actualisation of a near future– in the case of justice our experience of time presents the character of *Kairos* instead of *Chronos* –it appears as a space of timelessness and timefulness in which everything happens at the same time and an opportunity may be seized. The temporality of justice requires the case of the subject to be recognised here and now as his own, not as “another case.”

Nevertheless, this chapter also argued that the experience of this form of temporality changes from subject to subject and may affect the way in which the latter comes to understand the concept of justice. Mirroring the oppositions already presented in Chapters Three and Chapter Four, the last part of this chapter argued



that the way in which a subject may perceive and live the temporality of justice also oscillates between two poles: *expectation* and *anticipation*. The first of these extremes was identified with the case of Ángeles Pedraza and involved an understanding of justice in which the latter appears as an event taking place in a distant future, where the law will provide the subject with ultimate and everlasting recognition for his particularity of experience and his righteousness. In the second one –illustrated, in turn, with the case of Irene Villa– justice does not appear as an event whose befalling is dependent on the law, but as the very will of the subject to demand it: not as the outcome of his demand, but as the struggle conducted towards its achievement.

## INTERLUDE

### Three Ecstases and One Spectrum of Justice

Having posited expectation and anticipation as opposite ways of understanding the temporality of justice –and also having compared the latter with the temporality of the law– it seems only necessary to clarify, at last, the way in which the three dimensions of analysis studied throughout this theoretical block relate to one another, and how the two extremes considered in each of them cut across all three –establishing a spectrum between them in which intermediate understandings of justice could be located. That is to say that the purpose of this section is, in the end, to argue that even if contingency, desire, and temporality have appeared so far as separate and distinct dimensions in the formation of subjective understandings of justice, they are but three facets of the same phenomenon: three perspectives from which we can study the development of subjective understandings of justice as a result of our interactions and missed encounters with the law.

With that purpose in mind, and before moving on to the conclusions, I will try to elucidate the connection between the extremes considered in the analysis of each of the abovementioned dimensions. And, highlighting the similarities between *fate*, *desire*, and *expectation* on the one hand, and *character*, *jouissance* and *anticipation* on the other, over the next few pages I will try to depict two extreme and opposite ways of understanding justice along with some of the intermediate positions that could be located in the spectrum that flows between them.

#### **Fate, Desire, Expectation**

If we are to approach this first triad and comprehend the connection between its constituting elements, the best course of action is arguably to synthesise, as briefly as possible, the kind of understanding of justice resulting from (1) the attempt to articulate contingency in a narrative of fate, (2) its appearance in such a narrative

as an object of desire, and (3) how it seems to induce a future-oriented experience of time in which the attainment of such an object of desire is eternally postponed.

### *Justice as fate*

“The foal meant to go to war, is not eaten by the wolf nor miscarried by the mare.” In the sphere of fate there is no room for contingency as such: if a foal is meant to go to war, it will not suffer an untimely death before it reaches the field of battle; and if it does, it will be because it was never meant to go to war to begin with. In this sphere, causality supersedes possibility and coincidence, and every contingency appears but as a necessary stepping stone in the unfolding of a larger history. In the sphere of fate there is always an ultimate and hidden reason behind everything that happens. And, similarly, in a narrative of justice marked by fate the former appears as *the* future event with the power to overrule all contingencies and confer ultimate meaning to all the suffering and hardships undergone by the subject. Hardships that appear, in this kind of narrative, in the guise of a sacrifice: as a meaningful loss, as something given for the sake of a higher purpose that will make it worthwhile. As something given for the sake of a higher cause that, nevertheless, eventually subdues the particularity of the subject to the unfolding of its own history: to the future achievement of *that* cause. And, for as long as that cause remains to be achieved, it also remains as *the* cause and reason for all the experiences that led the subject to seek meaning and to form that narrative in the first place. Hence, if that kind of fateful and quasi-messianic justice were ever to be achieved by the subject, the latter would be left with but two options: either refusing to acknowledge that justice as *the* justice he hoped for or having to find a new way of conferring meaning to his life insofar as *the* element sustaining his narrative would fall apart through its very achievement.

### *Justice as desire*

This tendency to postpone or even deny the recognition of a form of justice as *the* justice that the subject had hoped to receive, along with the way in which such postponement seems to prolong the duration of the meaning given to the life of the subject by a narrative of fate, is what allows us to establish a connection between this and the second element of this triad: desire. In this kind of narrative we are presented with justice as an imaginary object of desire: as the object capable of

making the subject “whole” again<sup>108</sup> if it were ever achieved, and as the object that allows the subject to weather almost any adversity in pursuit of the promise of recognition and even redemption that justice –as an object of desire– carries within itself. Given the particularities of the law as Other –described in Chapter Four– the subject who comes to envision justice in such a way may also oscillate between fantasies of omnipotence and persecutory delusions depending on whether the law seems to be heeding his demands or not. And yet, the attainment of this kind of justice exceeds and escapes the realm of law insofar as, even when the latter seems to be taking into consideration the demands of the subject, the satisfaction that it can provide is never sufficient –and ultimately limited to the sheer enforcement of legal norms. Hence whether such demands are heeded or rejected, the desire underpinning the subject’s narrative remains structurally unfulfilled and reinforced in its unfulfillment: the attainment of its object eternally postponed onto the future, never to be experienced as such.

#### *Justice as expectation*

The quest for this missing object of desire allows the subject to become identified with its very absence, which only strengthens and reproduces such identification. It provides him with a renewed sense of purpose in life: attaining justice. Nevertheless, in this meaning-making process, the coming of the event that could make meaningful all the suffering and hardships undergone by the subject is handed over to an Other: law. An Other that, on the one hand, lacks the capacity or willingness to deliver it. But on the other, and even if the law could provide some form of justice, the subject may not recognise it as such insofar as the content and nature of such an event would have been previously surrendered to the Other in charge of delivering it. Hence the event that could finally fulfil the destiny of the subject and quench his desire for justice appears, in the end, as something that escapes his reach and can never be experienced: only awaited.

Considering the brief summaries above it should be possible for us, at this point, to highlight a series of common elements in this triad: elements that point to the

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<sup>108</sup> According to Lacanian theory, however, this “wholeness” that the subject hopes to regain is but an illusion. Quite the contrary, the subject is not constituted by this wholeness but by the lack of it.

connection between contingency, desire, and temporality in this particular way of envisioning justice. Among them it is necessary to emphasise the appearance of justice itself as an absolute event or object capable of subduing and reducing to an accessory role all other objects due to its necessary character. Moreover, in this particular and rather messianic understanding of justice, the latter always appears located in the future while being required by the past and, at the same time, largely dependent on the law to deliver it. The importance of absolute character of justice in the life of the subject who envisions it in such a way cannot be easily dismissed; however, if there is something that could be considered to be even more important to the subject that would be the very absence of this form of “absolute” justice. Insofar as justice remains as something to await or as a goal to achieve, it also retains the power to hold together the narrative of the subject and confer meaning to his life –playing, in this manner, a role arguably similar to that of the big Other. Taking into account these two aspects –the absolute and overwhelming character of justice, on the one hand, the apparent structural impossibility of attaining it, on the other– one could arguably say that the understanding of justice emerging from this triad appears as a form of “unfulfilled Messianism”: carrying within itself the promise of ultimate recognition and satisfaction, but having to remain always-yet-to-arrive in order to preserve its meaning-making function.

In the first place, and at the level of contingency, this transcendental and unfulfilled Messianism manifests itself in the fact that the fulfilment of the fate underpinning the subject’s narrative also brings an end to the unfolding of the history in which the latter had inscribed the meaning of all the contingencies leading up to the production of such a narrative. In other words, it would render them meaningless once again. Secondly, and without going into any further details in this respect, desire can never be fully satisfied. Insofar as justice is considered as *the* object that could bring everlasting satisfaction to the subject, no measure of justice that the law could provide would ever be sufficient: no justice can ever be *the* justice that the subject hopes for. Finally, in terms of temporality, the structural unfulfillment of this messianic understanding of justice stems from the fact that expectation refuses actualisation: the justice awaited by the subject can never be recognised as such insofar as its true content and meaning were handed over to the

law, hence whatever form of justice the latter could deliver will always appear as a distorted –if not outright corrupted– form of justice to the subject.

Ultimately, this messianic understanding of justice gives lasting purpose to the life of the subject in exchange for the structural unfulfillment of its goal and a higher level of dependency on the law qua agent –purportedly– capable of delivering that goal. And, continuing with the religious metaphor, one could arguably say as well that in this form of envisioning justice the latter appears, in the end, as the cornerstone of a cathedral: it holds everything together, but if you take it everything falls apart –either the cathedral or your belief that that was the cornerstone.

### **Character, Jouissance, Anticipation**

As in the previous case, in order to understand the relation among the three elements of this second triad we must consider the type of understandings of justice arising from (1) a narrative in which contingency is articulated as an excuse for the unfolding of the character and particularity of the subject, (2) the enjoyment found in the very act of demanding justice and making visible the limits of the law, and (3) the way in which such enjoyment seems to appear through the briefest realisation that the kind of recognition sought by the subject cannot be found in the law.

#### *Justice as character*

In contrast with the teleological articulation of contingency that marked the narratives of fate seen in the previous triad, the sphere of character tends to impose repetition and circularity of experience over causality and history. In a narrative of justice inscribed in the sphere of character, the unfolding of history no longer appears as a higher cause capable of subduing and overwriting contingency, nor does it reduce the subject to an accessory role in the achievement of a final goal. Quite the contrary, in this kind of narrative it is not possible to talk about history but about story: a story in which every contingency and every instance appears but as a sheer excuse for the persona developed by the subject to display its unique traits. In this kind of narrative it is not the achievement of a final and ultimate justice that matters, but the very struggle of the subject towards it: a struggle in which every contingency presents itself as a chance for a form of partial self-recognition

in which the subject invests himself. One could even say that for a subject who produces a narrative such as this there is nothing to set right, but a point to make: something to reaffirm, even if it can never be fully affirmed. Hence the persisting need for repetition in this particular type of narrative.

### *Justice as jouissance*

It is precisely this form of repetition that permits us, in the end, to establish a link between character and jouissance. In a narrative such as the ones summarised above it is not so much the satisfaction found in the attainment of a final and fateful goal that moves the subject, but the enjoyment that the latter derives from the very striving towards it. While perceiving that goal –that “Justice” with a capital J– as an object as desirable as unattainable, the subject also recognises the limited character of each small “victory” that could be obtained in the pursuit of such a goal. Nevertheless, and far from dissuading the subject from even attempting to find justice, the realisation of his limited chances of finding it in the law act as an incentive for the subject to find a certain degree of enjoyment –as small as it may be– in the very act of demanding it and pointing out the shortcomings of the institutions which promised to deliver something out of their reach. Driven by jouissance, the subject is not as concerned with the final outcome of his struggle for justice as with the enjoyment found in the struggle itself. And yet, insofar as each and every little measure of justice achieved by the subject takes the character of a partial object towards a goal already assumed as unattainable, no degree of justice is ever sufficient for the subject demanding it. Not because that is not *the* justice that the subject hoped for –this subject hopes and expects nothing from the law– but because the struggling and even hoping for justice appear as a form of justice in and by themselves.

### *Justice as anticipation*

The fact that the subject does not seek to find everlasting satisfaction in the future achievement of an absolute object but rather derives enjoyment from the very struggle towards that future goal already hints at a significant difference in terms of temporality with regards to our previous triad. Expecting and anticipating justice are not the same. The former entails, as explained above, that the subject must await –law willing– the coming of a future and final justice to befall him; in the case of

the anticipation, on the other hand, the subject becomes aware –even if only for an *augenblick*, for the briefest of moments– that the actual functioning of the law is but a pale shadow of its ideological façade, and that, in consequence, such justice is most likely never to befall him. This realisation throws all three ecstases of time –past, present, and future– into perspective and allows the subject to take responsibility for his actions –regardless of their ultimate consequences, commencing with the very act of demanding justice– hence reducing his degree of dependency on the law and the institutions that would otherwise be expected to provide him with justice. The anticipation of justice does not consist in waiting for the law to provide it, but in understanding that the law can only do so much in this regard. It consists, in other words, in understanding that the subject himself is far more likely to find a certain degree of recognition of his particularity in the very act of defending it before the law than in whatever results the latter could arguably provide.

As in the case of our previous triad, it should also be possible for us to point out a series of similarities between the three elements summarised above at this point. And yet, in contrast with the previous section, it should also be said that the interaction between character, jouissance, and anticipation does not result in a transcendental understanding of justice in which the latter appears as a final and ultimate object with the power to set things right and bring everlasting satisfaction to the subject. Quite the contrary, justice does not appear on this side of the spectrum as much as a goal to be achieved as it appears as something to be done: not as an outcome, but as an action worth the effort put into it in and by its own right. In other words, and in opposition to the pole of the spectrum described above, the understanding of justice that we find here is not transcendental nor messianic, but deeply marked by immanence. Nonetheless, this form of envisioning justice also entails a whole series of effects of its own: and first and foremost amongst them that no recognition and no justice obtained from the law will ever be sufficient for the subject demanding it. Not because no-thing is *the* thing that the subject hoped for, but because the subject can only find a certain recognition of his particularity in the very act of demanding it and hence no recognition obtained as a result can ever be enough for him.



At the level of contingency this entails that the purported actualisation of an appointed fate is overshadowed, when not outright superseded, by the role of the subject in the striving towards it. The struggle of the subject –when not the subject of the struggle himself– takes a protagonist role, relegating history, argument, and causality to a secondary function if not to a sheer excuse for the display of the characteristics of the subject. Similarly, at the level of jouissance this entails that no enactment of such unique traits can ever bring into existence the character of the subject to its full extent. Instead of denying any satisfaction for the sake of an ultimate and everlasting satisfaction, the subject comes to find a certain degree of fulfilment in each conflict, but its limited character stirs the need for further conflicts and objects with which to satiate that need for recognition of his particularity. Hence in this paradigm the law as Other ceases to appear as *the* agent that can provide the subject with what he sought to achieve in the first place, and manifests itself as a castrated but necessary Other with whom to quarrel for that purpose over every object and contingency. Not as a saviour or as an enemy, but as an adversary. And finally, in terms of temporality one could arguably also say that this change in the subject's perception of the law, seeing it in a necessary yet limited role, allows him to consider himself not as an accessory or complement to the function of the latter but as the protagonist of his own struggle for justice: becoming, through this realisation, responsible for his actions regardless of their final outcome.

In the end, through this immanent understanding of justice the subject comes to achieve a strong driving force in his life in exchange for an unquenchable thirst for new circumstances in which to reaffirm and re-enact his quest for justice.

### **Typology**

Having characterised the two three-dimensional extremes of the spectrum within which it becomes possible to locate intermediate understandings of justice, it is time, at last, to attempt a typology of the latter. For that purpose, nevertheless, I would like to make a series of disclaimers before presenting it. First and foremost, I would like to clarify this typology has an ideal character. This means that, as in the case of the two extremes described above, none of the intermediate positions in the spectrum presented here fully represent all the characteristics of a given

understanding of justice. There are as many of the latter as there are, have been, and will be, subjects who demand it. Quite the contrary, this typology seeks to present a series of clear and easily identifiable intermediate positions that could add clarity and an illustrative value to the study of the formation of particular understandings of justice. And, in this regard, I would like to add that without a minimum understanding of the specificities of the investigation developed throughout this research project the use of such a typology could be misleading.

Secondly, it is also necessary to highlight that this typology has a preliminary character. The first two chapters of this project sought to clear the ground for the construction of a new theoretical apparatus in the study of the formation of subjective understandings of justice, and the three following ones have aimed to analyse in depth what I have considered to be the most basic and indispensable dimensions in the study of this phenomenon along with their origins and implications. This does not mean, however, that these are the only three dimensions to be considered: only the most basic ones. Hopefully this study will open the gate for future projects seeking to investigate justice not as a moral principle or as an ideal that the judiciary should pursue, but as a deeply complex political and psychosocial phenomenon with several layers in its process of formation.

And last but not least, regarding the typology itself I would like to say that given the deep interconnection between the dimensions of contingency, desire, and temporality considered here it would seem unlikely to find or think of intermediate understandings of justice presenting significant divergences between them in one or another direction. Hence the types presented hereafter present a minimum degree of synchronicity between these dimensions.

### *The Hermit*

In the wake of a life-disrupting contingency, this subject finds himself so devastated and driven by loss that even the possibility of contesting that things could be otherwise seems too otherworldly. There is no mundane justice that could repair the wreckage left behind by the suffering endured by the subject; in consequence, the latter virtually retires from such a life, leaving all hope of recognition and justice to a power even higher and beyond the reach of law. The subject knows that the power of the latter is limited, but that does not prevent him

from hoping final and everlasting satisfaction from a different and more elevated power that could bear witness to the value of his particularity, even if only beyond this vale of tears. Therefore justice remains as something which the subject may hope to befall him in a distant –and otherworldly– future, just as in the case of the abovementioned unfulfilled Messianism.

### *The Ascetic Job*

Not to be interpreted as “the work of the ascetic” but as a form of envisioning justice that combines elements from both the biblical figure of Job and Ascetism, this intermediate position also appears, in principle, significantly closer to a form of unfulfilled Messianism than to an immanent understanding of justice. It presents some differences with respect to the Hermit, though. In the first place, it is worth noticing that the sphere of fate plays a major role in the form of articulating contingency in both cases. Nevertheless, and instead of commending himself to an otherworldly justice lying above and beyond the reach of law with the potential to set things right at last, the Ascetic Job comes to envision justice in an equally quasi-religious and non-negotiable way which requires him to weather all sorts of setbacks and hardships while remaining faithful, not to the possibility of attaining justice, but to the possibility –of the existence– of justice itself. No measure of suffering or disappointment endured by the subject could make him even question justice: it is non-negotiable and above him and the law, both. For the Ascetic Job justice appears as an unfathomable fate that can be wished but not properly expected; and yet, it also appears closer to jouissance than to desire itself. All difficulties and troubles are experienced as a test in which the subject must prove himself worthy of a justice that, nevertheless, he may never attain: as a series of tests in which the subject becomes capable of reasserting his worthiness even if he may never receive full confirmation of it.

### *The Avenger*

Among all the positions considered here, the Avenger stands out as the most peculiar one. The main reason for this is that this subject does not take part in a direct interaction or confrontation with the law that could give rise to the emergence of a new understanding of justice. Thus this position cannot really be found within the spectrum demarcated in these pages but apart from it. The Avenger, the subject

who openly, secretly, and wholeheartedly seeks revenge without even daring to hide it behind the mantle of justice knows and accepts that the law cannot provide him with that which he wishes for. Hence there is no real need for him to enter into a dialogue or conflict with the latter. The reason behind this, as open to debate as it may be, was hinted at already in Chapter Four. Successful communication and understanding is based on the existence of shared experiences (Wittgenstein [1953] 1967) and this subject is in need of recognition and understanding, just as any other. For him, however, this recognition cannot come from the law or any other third party, but only from the person or institution who took part in the occurrence of the contingency that shattered his life into pieces. And, for this avenger, the only way to make them understand is to inflict upon them the same suffering at the level of the Real. For him, once that has become part of the basis upon which they have built their world, they will be able to understand, at last, all the pain that he had to endure because of them. A pain that, nonetheless and insofar as it is experienced at the level of the Real, is unmeasurable and thus may also lead to the infliction of disproportionate suffering in the hope of being understood.

### *The Crusader*

In the already-classical Lacanian reversal of Dostoevsky's "If God doesn't exist, then everything is permitted," it is said that "If God doesn't exist, then nothing is permitted." Its complement, as one may imagine, is that "If God exists, then everything is permitted...and anything is possible" Our Crusader lives by this rule: if such a thing as justice does exist, then any action of the subject carries within itself the potential to and the possibility of bringing about justice. Just like Kierkegaard's *knight of faith*, our Crusader anticipates the possibility of justice even if he knows that it is something that he cannot expect from the instances from which he demands it. He is ready to do what he feels is right even if he knows that the law may not set things right in the end. And yet, even if he is ready for the worst, he hopes for the best. This entails that for this subject justice does not appear as an inescapable fate but as a possibility, as something that may or may not befall him. In spite of the odds, he is willing to fight the good fight for its sake, because not doing so would mean renouncing the very possibility of justice. It may or may not be attained, our Crusader is not completely sure of this because he is aware of the less-than-perfect character of the law, but insofar as he wants to believe that

something such as justice may exist it may yet not be “all for nothing” for him. For this subject demanding justice and pointing out the flaws of the law is not only another stepping stone or obstacle to be overcome in his quest to display the unique traits of his character, but also an act of faith insofar as taking such a leap in the dark also implies a leap of faith: he wants to believe in justice even if everything he has ever seen goes against this belief. For the Crusader justice is not his fate but part of his character; not something that he can expect but only anticipate; and also, in the end, something that he expects to receive and simultaneously enjoys doing.

### *The Zealot*

In this position the subject appears uncompromising: absolutely determined to bring about justice. It is the reversal of the Crusader. For the Zealot, justice is a fate that cannot be escaped, and also an event to be expected that can set things right, at last. In this, the way in which the Zealot envisions justice does not differ much from the form of unfulfilled Messianism that constitutes one of the extremes of this spectrum. And yet, there is a significant difference between them. In the latter the subject postpones, when not directly denying, the possibility of acknowledging as justice whatever resolution the law may see fit to bring forth in response to his demands. Our Zealot does the exact same thing, and not only because no justice is *the* justice that he hoped for, but also because he finds a certain degree of enjoyment in making visible the lack of justness of the law and any Other who may think of questioning his uncompromising views on justice.

### *The Mystic*

If a mystic approach to religion entails becoming one with the God or the absolute, this position reflects a bipolar approach to justice in which the subject perceives himself not only as a demander and potential recipient of justice but also as its agent. On the one hand, and as a justice-demanding subject, the Mystic accepts the difficulty of obtaining the justice he seeks while also making clear that the less-than-omnipotent character of the law is not an excuse for the latter not to attempt to provide it. On the other, and as an agent or justice-providing subject, the Mystic acknowledges that even if it may be out of his reach to provide others with the degree of recognition that they hope from him, it is still his duty to do his best to meet such expectations.

### *The Agnostic*

This subject, as its very name suggests, is someone who does not affirm or deny the possibility of justice. For the Agnostic it is not an inescapable fate nor something that is constitutive of his own character, but something that he may obtain to a certain degree if he but dares to ask for it when required. For him it is something desirable, but not necessarily something that he desires. And, in the same manner, justice does not appear to the Agnostic as something that he should expect or as something that he can truly anticipate, but as something that may or may not exist and, even if it does, may only befall him to a certain extent.

### *The Apostate*

The Apostate is a subject who has taken a transcendental –and unfulfilled messianic– understanding of justice to its ultimate consequences, and when denied the kind of recognition he strives for prefers to deny, outright, the possibility of justice in toto rather than to accept that his faith in the law may have been misplaced, or that his struggle lacked enough basis for the claims it presented before it.

### *The Atheist?*

In all honesty, and given the religious metaphors used to illustrate all other intermediate ways of envisioning justice, it seemed necessary to consider the possibility of a subject who denied justice altogether. A subject who did such a thing would be someone who would not see the reason for exacting revenge nor demanding justice in the wake of a life-shattering contingency. A subject for whom things would simply occur as they occur, with no need of even discussing the possibility that everything may have happened otherwise. A subject for whom, in the end, the most mundane need for meaning and recognition would be uncalled for.

## CONCLUSIONS

### Justice Just Is

Having its origin in the sense of perplexity arising from the demands for justice articulated by a series of victims of terrorist attacks and the apparent inability of legal and judicial institutions to fully satisfy them, this research sought to study the formation of subjective understandings of justice as a result of our encounters and missed-encounters with the law. That is to say, the way in which a subject may come to use and understand this term as a result of his interactions with the legal and judicial institutions from which he hopes to attain recognition for a particularity of experience born from arguably life-destabilising circumstances.

The preliminary study of the body of literature produced by liberal theorists of justice and four different schools of legal thought transformed the first questions to appear as a result of the perplexity that followed the events described earlier on in this thesis: the protests associated to the approval –and later repeal– of the Parot Doctrine in 2006, and the permanent ceasefire declared by ETA in 2011. The discovery that the abovementioned disciplines had respectively focused on justice as a given balance between freedom and equality, or on its relation with and the figures of the law-maker and the judge revealed a lacuna that this project aimed to fill: they had paid little to no attention at all to the role of the particular subject who goes before the law in the hope of attaining justice. The questions driving this research at first –e.g. Is the enduring character of certain demands for justice a symptom of an unsatisfied desire for vengeance?– necessarily evolved into more basic but pressing ones: When do we start talking about justice? What circumstances have the potential to move us to do so? What meaning-making processes and unconscious mechanisms may lead to the production of a new

subjective understanding of justice? What do we need in order to feel that justice has been served? How does it affect our relationship with the law?

In consequence, the answers that this research has sought to offer in response to such questions do not respond to an attempt to provide a substantive definition of justice, nor suggest ways to improve the functioning of our political and legal system. Quite the contrary, these answers enjoy an arguably genealogical character. Instead of trying to pinpoint an exact definition of justice above and beyond economic, social, political, and historical developments, this thesis has aimed to investigate the way in which our knowledge –our use and understanding– of justice as a concept can be affected by a milieu of power relations formalised and crystallised in the law through a metonymic operation.

Following the Introduction and starting with the study of the role of justice and the particular subject in liberal theories of justice and four schools of legal theory – Natural Law, Legal Positivism, Legal Realism, and Critical Legal Studies– the first chapter of this dissertation determined that while justice had either been considered as an ideal equilibrium between freedom and equality that changed from author to author, or as an ideal which our political, legal, and judicial institutions should aspire to and in the name of which they should be transformed, the possibility that a particular subject may have an understanding of justice significantly different from the sheer enforcement of “legal justice” or those expressed by the authors working in both fields had been largely overlooked.

With the goal of filling this lacuna, the relation between the particular subject and the law was taken, in Chapter Two, as the foundation for the construction of a theoretical apparatus aimed at studying of the production of subjective understandings of justice. This involved, in the first place, considering two basic characteristics of the law in its relation with the abovementioned subject: generality and normativity. The study of generality revealed that while the law necessarily produces subjectivities, such subjectivities are considerably contingent and change from case to case, leading to a virtually endless variety of particularities that entails the necessary exclusion of the particularity of experience of the subject from the domain of the law. The analysis of normativity, on the other hand, showed that while the eventual breach and subsequent enforcement of legal norms is required



by the law in order for it to continue to exist and remain in force, its application can never be directly conducted towards the resolution and recognition of the particularity of *the* case it is to be applied to: it is based on previous experiences and has the potential to set a precedent for future cases and norms, but the possibility of passing a legal norm solely for the resolution of a specific case and the recognition of its particularity is absolutely excluded. Secondly, the study of these two characteristics and the power relations that they generate between the law and subject revealed what appeared to be three constituent limits of the law: contingency, reflecting the structural incapability of the law to recognise the particularity of experience of the case presented by the subject; subjectivity, appearing as the clash between the general character of the law and the subject's wish to see his particularity universally recognised by it; and justice, the *point de capiton* that holds both unbridgeable gaps together and underpins the will of the subject to find recognition in spite of the shortcomings of the law.

The importance of these limits in the conflictive relation between the subject and the law called, in turn, for the consideration of three basic and matching dimensions of analysis in the formation of subjective understandings of justice: contingency, desire, and temporality. These three dimensions were investigated in the second half of this thesis, where the cases of Ángeles Pedraza and Irene Villa were introduced with an illustrative purpose, devoting one chapter to the study of each of these dimensions –along with a final Interlude meant, on the one hand, to clarify the relation between them, and, on the other, to propose an ideal typology of subjective understandings of justice on the basis of their study.

Chapter Three sought to investigate the circumstances under which a subject may start talking about justice. With that purpose in mind, it revolved around the role of contingency in the functioning of the law as well as on its destabilising potential in the life of the subject. On the one hand, contingency appeared as a basic requirement of the law insofar as without it there would be no room for law-enforcement; and hence, without contingency, the continued existence of law itself would be in jeopardy. On the other, the occurrence of unexpected and potentially life-disturbing events in the life of the subject may not only shatter to pieces the symbolic universe holding it together, but also carries within itself the promise that other equally unexpected and dangerous events may follow. In the wake of such

uncertainty, the subject may seek stability and normality once again in the norms that so far had regulated his life. Norms that the subject hopes will be able to put together the pieces of his symbolic universe and meaningfully articulate the contingency that destroyed it in the first place. Nevertheless, the articulation of contingency that the law may provide in this regard is far from meaningful in the eyes of the subject: every case and every contingency moving a subject to go before the law is treated as any other, and thus the particularity of experience and the suffering undergone by the subject are left largely unrecognised. Following the encounter with this shortcoming of the law, the subject may end up producing a new narrative capable of articulating contingency and restoring meaning to his life. A narrative that not only seeks to overcome the destabilising effects of contingency but also an unavoidable sense of disappointment with the law. A narrative that, as was exemplified through the study of the similarities and radical divergences between the cases of Pedraza and Villa, may oscillate between two extremes respectively identified with the Benjaminian concepts of *fate* and *character*: between a teleological when not ostensibly messianic understanding of justice, and a self-referential and subject-oriented rather than law-oriented one.

Chapter Four centred its attention on the unconscious mechanisms driving the production of such narratives. Making use of Lacanian psychoanalytic theory, this chapter studied the emergence of subjective understandings of justice through the analysis of the triad need-demand-desire in relation to justice and the way in which the particularities of law qua Other may affect the appearance of desires for justice. In this regard, law presented a series of characteristics, analogous to those of the Phallic Mother, which led to the formation of the Hypothesis of the Phallus –“there must be something that makes the law pay attention to your demands and give you the kind of justice you seek”– but not the paternal metaphor or Name-of-the-Father –“there is no clear reason for the law’s ostensibly whimsical behaviour, no clearly identifiable ‘something’ that could grant its attentions”– since, in order to preserve its ideological function, it cannot admit the existence of an authority above and beyond itself. Following this line of reasoning, and continuing with the structure used throughout the analysis of all three dimensions of analysis, the unconscious mechanisms driving the production of a narrative of justice were found to oscillate between *desire* –justice as an imaginary object of desire whose attainment would

offer full recognition of the particularity of the subject but is also eternally postponed onto the future— and *jouissance*—the subject admits that such a thing as an ultimate or absolute justice may not exist and thus does not seek to obtain it. Justice does not appear as the potential outcome of a struggle towards it but as the struggle itself, and hence the subject finds recognition not in the attainment of justice as an imaginary object of desire but in the very act of demanding it while pointing out the castratedness of the law in this regard. Desire and *jouissance*: two extremes that were respectively identified with the cases of Ángeles Pedraza and Irene Villa once again.

Finally, Chapter Five, addressed the differences between the temporalities of law and justice. It argued that while the temporality of the former presents a chronological character in which every case and every present appears as the missed encounter between a “not yet” and a “too late,” the temporality of justice requires of immediacy and hence adopts that of *Kairos*: an space of timelessness and timefulness in which everything happens at the same time and an opportunity may be seized. A space in which justice demands my case to be recognised as *mine* here and now. Nevertheless, it was also stated in this chapter that the way in which a subject may come to perceive and live the temporality of justice changes from case to case and affects the form in which this subject may come to use and understand this concept. An understanding of justice that, once again, oscillates between two opposing poles: *expectation* and *anticipation*. The former, exemplified in the case of Ángeles Pedraza, entails that the subject sees justice as an event actually taking place in a distant future—having made significant sacrifices for its attainment—where the wicked will be punished and the just will receive everlasting recognition of their righteousness. An event whose occurrence is, nonetheless, handed over to the law—which comes to occupy a position analogous to that of God in a messianic narrative of justice. Anticipation, on the other hand, presented us with a very different form of conceiving the temporality of justice. For the subject, identified here with the case of Irene Villa, the possibility of attaining justice is not dependent on the capability or will of the law to deliver it, but on the very will of the subject to demand it: it does not appear as a final outcome whose befalling the subject must await, but as the very action conducted towards the achievement of that outcome. That is to say that, in anticipation, instead of hoping for the law to offer final and

everlasting recognition of the particularity of the subject, the latter finds partial yet full recognition for it in the very act of demanding justice: “partial” insofar as it does not provide any form of ultimate recognition, but also “full” insofar as only the justice-demanding subject can fully comprehend the extent of his particularity of experience.

The Interlude sought, on the other hand, to link the last three chapters of this dissertation together. It sought, in other words, to present them as three separate yet deeply intertwined aspects of the same phenomenon: the production of subjective understandings of justice in relation to law. With that purpose it posited a series of similarities between the extremes considered in all three dimensions. That is to say, the connection between fate, desire, and expectation, on the one hand; and the parallelisms between character, *jouissance*, and anticipation, on the other. At last, and having constituted the two three-dimensional poles of a spectrum of possible understandings of justice –which were previously illustrated with the cases of Ángeles Pedraza and Irene Villa– it aimed to propose an ideal typology of such understandings in which it became possible to identify, at least, nine intermediate positions: the Hermit, the Ascetic Job, the Avenger, the Crusader, the Zealot, the Mystic, the Agnostic, the Apostate, and the Atheist. Among them, it is perhaps the Avenger that is more deserving of a special mention insofar as, unlike the others, it cannot be directly inscribed into the spectrum considered here. Quite the contrary, and against the original presuppositions of this research, in which it was considered that the persistence of certain demands for justice may have their origin in a sublimated and unfulfilled wish for vengeance, it appears as a position alien to the discursive production of narrative understandings of justice since the interaction with the law originally propitiating their appearance never takes place. In this position, the subject seems to presume the inability of the law to provide him with that which he seeks, and thus avoids any unnecessary interactions with and potential interferences of the judicial system that may get in the way of his revenge: in the way of the goal of seeing his particularity of experience recognised by the perpetrator, the only other person who may have taken part in, and thus be able to comprehend, the contingency leading up to the overwhelming sense of meaninglessness that invades him. Something that takes place at the level of the

Real and may lead to the infliction of punishments escaping any measure of proportionality inasmuch as the Real is without fissure but also without measure.

And yet, notwithstanding the relevance of this discovery, with the potential to turn inside out some of the questions and premises initially driving this research, the main findings of this project could be roughly summarised as follows: a new subjective understanding of justice arises as a result of and in response to the shortcomings of the law in the articulation of potentially life-disturbing contingencies; in the wake of such contingencies the subject may seek solace and help in the law, but the latter is structurally incapable of providing the subject with that which he seeks –the universal recognition of his particularity of experience– and, in consequence, the subject is moved to produce a narrative of justice capable of offering a complementary articulation to the abovementioned contingencies. The meaning-making processes and discursive interactions that take place between the subject and the law, and eventually lead to the production of a narrative of justice by the former, are driven by a series of unconscious mechanisms –oscillating between desire and jouissance– that are, in turn, generated by such interactions and marked by the similarities between the law and the Phallic Mother. Whatever understanding of justice the subject may have come to develop before the contingency triggering this kind of process is profoundly altered by the evolution of the latter, leading to experiences of time in relation to justice that may oscillate between the expectation of an ultimate justice with the potential to finally set things right, and a more immanent way of conceiving this concept in which justice arises from the very act of demanding it.

This incursion on a subject traditionally reserved to political theory and liberal theories of justice entailed an attempt to bring the field of psychosocial studies closer to these two disciplines, while also trying to fill some of the gaps that they seem to present in the study of this topic. On the one hand, it aimed to go beyond the idea of “justice as fairness,” which tends to equate justice to a given balance between freedom and equality, by addressing the question of justice head on: looking at the way in which a particular subject may come to develop an understanding of this concept not only diverging from the current legal, economic, social, and political status quo, but also from the normative definition of justice provided by any of the scholars working in this field. On the other, it sought to

complement legal theory by addressing a series of questions preceding any potential suggestions of improvement for the current legal and judicial system: we may want to increase the level of satisfaction of the citizens of a given country with the current functioning of legal justice...but in order to do that we must first understand what it is that they mean by justice and how that may differ from the sheer enforcement of currently existing legal norms. In other words, this thesis has not aimed to invalidate the postulates made by authors working in either of these fields, but to propose what one may understand as a meta-theory of justice in which any normative definition –when not outright application– of the latter should be preceded by a deeper degree of comprehension of the way in which a justice-seeking subject may understand this concept.

Nevertheless, the theoretical apparatus presented here for the study of justice is not strictly restricted to the analysis of this concept. It has undoubtedly been tailored for this purpose, but it may also be adapted to the study of other emotionally-charged and politically-relevant concepts such as democracy, corruption, freedom, equality, tolerance, etc. For instance, if we consider for a moment the relevance of the concept “democracy” in the protests following the Great Recession –especially from 2011 onwards– and appearing in response to the inability of national and global elites to tackle this problem, it seems clear that the idea of “democracy” more or less explicitly implied in these protests differed quite significantly from the sheer fulfilment of the rules regulating the voting system in each country: What did the Indignados mean by “Real Democracy”? How is it possible that the protests were followed by an astonishing victory of the conservative party in Spain? Where can we locate the origins of this moment in which the Spanish public sphere became significantly re-politicised? Has this wish for “Real Democracy” endured? And, if so, under which form? Does that form of understanding of democracy match the way in which thousands of Spaniards conceived it when they brought this demand for democracy to the streets and public squares of the country following the 15<sup>th</sup> of May of 2011?

Notwithstanding the findings and potential implications of this thesis, it is worth noticing its limitations and the way in which they may be complemented by other fields, with which it hopes to start a dialogue. First and foremost among them is the inability of this inquiry to provide a clear substantive definition of justice. Other

disciplines have attempted to do so in the past but, as stated above, it was not the goal of this research project to offer another definition of justice but to complement such normative approaches with a deeper understanding of the ways in which a particular subject may come to conceive and use this concept. Secondly, this project only took into account three dimensions of analysis in the production of subjective understandings of justice –contingency, desire, and temporality. This does not mean that they are the only ones to be considered or that there could be no other dimensions to be investigated in this regard. In consequence, and insofar as the ideal typology of ways in which justice may be conceived by a particular subject may as well be altered by the introduction of new dimensions of analysis, such a typology is inherently limited. Moreover, it is also important to remember that the abovementioned typology had an ideal character –it sought to provide a series of clearly identifiable ways in which a subject may come to understand justice– something that entails queries of its own: there may be as many different understandings of justice as there have ever been subjects who have ever demanded it, but in the spectrum demarked by the abovementioned three basic dimensions these ideal types only appear as the most easily identifiable ones. Finally, it may be worth noticing, yet again, that while the question of justice may have been put in relation to spheres other than law (e.g. politics), the latter also enjoys a metonymic character in the study of the relation between justice and these other fields; and thus, the theoretical apparatus developed here would equally require to be tailored to the study of phenomena more clearly belonging to them.

Going beyond the analysis of contingency, desire, and temporality as three basic aspects in the study of the formation of subjective understandings of justice, future research projects conducted along the lines of this thesis could investigate the role and potential implications of further dimensions of analysis in the study of this topic (e.g. Are there any other unconscious mechanisms, besides desire and jouissance, involved in the production of these understandings? Where do they stem from and how do they interact with these other dimensions?). Their inclusion would also entail a significant change in the ideal typology of subjective understandings of justice presented here, requiring a revision of the latter in order to accommodate any new findings. However, this does not mean that the current configuration of this typology could only be changed through the inclusion of new dimensions of

analysis. Quite the contrary, and insofar as the ideal types considered in this study are but arguably stereotypical and easily identifiable understandings of justice, it would also be possible to complement the two extremes and nine intermediate types presented in this thesis with further intermediate positions without having to consider any other dimensions of analysis.

Following this line of thought, the theoretical apparatus built in this thesis may also offer a point of departure for more empirically-oriented studies with the goal to investigate in detail cases similar to those presented here or even others that may gain visibility due to new political scenarios, such as Colombia's newly commenced peace process –which ostensibly appears as a mix between the Truth and Reconciliation Commission in South Africa, the Nuremberg Trials, and the respective cases of ETA and the IRA in Spain and the UK. Moreover, and given that this research can arguably be considered as a meta-theory of justice, the combination of this theoretical apparatus with more archival and biographical studies could also make possible the study of normative theories of justice produced by relevant authors in the field as more elaborated and theoretically-oriented versions of the very narratives discussed here.

Another possibility is deepening the clarifying potential of this study, in regard to the several layers of arguments that may appear mixed together in the attempt to build a normative theory of justice, through a more head-on analysis of its relation with political and legal theory –the very disciplines that it aimed to complement through a psychosocial approach. And last, but not least, the emancipatory potential of some of the findings of this thesis may also require further discussion. On the one hand, the ideological façade of justice presented by legal and judicial institutions seems to equally foster an image of omnipotence –meant to mask the structural impossibility of the law to provide justice beyond the mere application of legal norms– and the emergence of narratives of justice –closer to the spheres of fate, desire, and expectation– that, in spite of appearing in response to the shortcomings of the law, may reinforce that very false visage of omnipotence. The fourth chapter of this thesis related this issue to the discourses of the Master and the Hysteric, and the way in which the interactions between the law and the justice-seeking subject seem to be marked by them: the law addresses the subject in his functional role as citizen and enjoys his production –the very recognition of the law



as a valid authority along with the growing dependency of the subject on it to attain that which he wants— and the subject seeks a master —the law— he can control through his very subjection to it. But...what would happen if the law publicly admitted its own castratedness? What would happen if legal and judicial institutions declared that all they have to offer is sheer enforcement of legal norms? And if they asked the justice-seeking subject “What do you want? Because this is all we can provide. Do you still want it?” In other words, what would happen if the law abandoned the Discourse of the Master and adopted one closer to the Discourse of the Analyst?

The second aspect of the emancipatory potential of this thesis that could be studied in further depth in future research projects stems from the previous one. Concepts such as democracy, representation, equality or freedom appear as controversial, emotionally-charged, and politically relevant as justice. Hence an analysis of these concepts inspired by the theoretical apparatus developed throughout this thesis may lead, in turn, to the appearance of questions resembling those described in the previous paragraphs: What did the demonstrators in Syntagma Square, Zuccotti Park, or La Puerta del Sol mean when they said that they wanted “real democracy”? Would it be possible to imagine a similar transition from the Discourse of the Master to the Discourse of the Analyst in politics? What would happen if our ruling institutions were to publicly admit that all they have to offer is the replacement of one political elite for another? What would happen if they were to admit, as in Lampedusa’s *The Leopard*, that everything needs to change so that everything can stay the same? What is, and what could be, the role of the particular subject, the Unamunian “man of flesh and bone,” in each case?

Perhaps the major contribution of this research project relates to the last question. A psychosocial approach to the study of justice has the potential to bring this discipline closer to the work of scholars operating in the fields of political and legal theory; and, as explained above, it also aims to complement the studies of justice conducted in these fields through a transdisciplinary approach with the potential to fill in some of the lacunae already described in this thesis. However, the uniqueness of this analysis of the formation of subjective understandings of justice lies in the fact that it aimed to situate the subject at the forefront of an eminently political problem through a metonymic movement that posited the law

as the formal crystallisation of the political, social, and economic status quo. Going beyond the feminist motto “the personal is political,” this thesis has not only aimed to highlight the prominent role of the subject in politics but also, and more importantly, the role played by politics in the psychic and social life of the subject. In other words, this study has emphasised that the personal is political, but also that the political is equally personal. The degree of influence of politics on the psychic life and well-being of a particular subject cannot be easily underestimated. Either because it operates as an overarching framework with the power to set the basics for our social interactions or because it is the sphere we turn to when our private lives have become dismantled by a series of unexpected circumstances, politics appears as a force with the power to shape the psychic and social development of a particular subject not only as citizen, but also as “the man of flesh and bone; the man who is born, suffers and dies –above all, who dies; the man who eats and drinks and plays and sleeps and thinks and wills; the man who is seen and heard; the brother, the real brother” (Unamuno, [1913] 1972).

This subject, this “man of flesh and bone,” is someone for whom his recognition as a valid interlocutor at a political level –as citizen, as voter, as tax-payer– may not suffice. His part as citizen is but a role that, as any professional actor, he may have to play every now and then. But that role does not and cannot comprehend the entirety of his subjectivity. The citizen, defined by a series of legal and political parameters, is but an aspect of the subject. He is more than that: he is the actor behind the mask of the citizen, with all the joys and miseries which that entails. And thus, when the life of this subject becomes disturbed not only in its role as citizen but also in other dimensions, he may seek a type of recognition for his particularity of experience that goes beyond such a role. A type of recognition that the subject may seek in spite of the inability of the law to provide it. A type of recognition that leads, in the end, to a questioning of the law and the political status quo –deepening into the already-problematic relation between them and the subject.

Mirroring Kierkegaard’s existential reaction to the prominence of Hegel’s systematic philosophy in the early 19<sup>th</sup> Century, the importance given in this thesis to the particular subject –along with the potential implications of his troublesome relation with the law and politics– differs, quite significantly, from the emphasis put in the fields of political and legal theory on more institutional aspects of justice.

Without dismissing the relevance of the law-maker or the judge in this respect, this “anthropolitical” approach aimed to complement and inform such studies –chiefly centred around the role of these two parties– with a more thorough focus on the role of the ostensibly forgotten justice-seeking subject. Therefore, the implications of this research are not exclusively limited to its most theoretical aspects. It may inform further studies on justice in such and such manner, but it may also offer some guidance in policy insofar as the gap between the ideological promise of justice visible in the law and its actual functioning –rooted in the sheer enforcement of legal norms– lies at the core of the any potential discontent of the particular subject with it. It is not that legal and judicial institutions are dysfunctional, corrupted, or incompetent: they do what they have been designed to do. And what they have been designed to do is not the same as what they have been designed to promise to do.

This, however, cannot be fully disconnected from politics. And, more particularly, from phenomena such as the ongoing tendency towards over-legislation, in which different political actors may seek short-term electoral profit through the promise of higher levels of justice. A promise that is ultimately translated into an ever-growing and ever-more-punitive legal body that threatens to encompass and tame each and every single form of human activity in the name of justice. That is to say, a form of over-legislation that, rather than magnifying the authority of the law through the delivery of higher levels of “justice” –a concept that, at a political level, seems to carry ever more punitive connotations with every passing year– results in a public display of powerlessness in which every attempt of the law to micro-manage the lives of the subjects it is supposed to regulate happens to reflect its own inability to do so. An inability that stems, in the end, from the unbridgeable gap between the citizen –the subject of the law, the subject of the enunciated who demands the application of legal norms– and the particular subject –the subject of the enunciation, the man of flesh and bone who not only seeks the enforcement of the law but also the universal recognition of his particularity of experience. There are as many justices and as many ways of understanding this concept as there have been subjects who have ever demanded it, and any attempt to provide an all-encompassing administration of it through an ever-growing legal body is ultimately doomed to fail.

At this point, and having built the theoretical apparatus necessary for the study of the formation of subjective understandings of justice, I would like to emphasise, once again, the structural inability of the law to provide the universal recognition of a particularity of experience sought by the subject under the name of justice. And, in consequence, to invite our institutions to abandon the Discourse of the Master along with any further promises of justice –potentially leading to an ever-expanding legal body that does not and cannot do away with that which is structural and consubstantial to the law itself: normativity. I would like to invite these institutions to publicly abandon their ideological mantle of omnipotence and admit their own limitations, their castratedness, and adopt an approach closer to the Discourse of the Analyst in their relation with the subjects whose lives they are to decide by simply saying: “You are seeking justice, but this, the sheer application of legal rules, is all we have to offer. It may not be enough, but it is something. Do you still want it?” And let them decide.

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